Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 39 ST. LOUIS, MO., AUGUST 17, 1894. No. 7

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That the existence of an extradition treaty between this country and a foreign country does not prohibit the surrender by either of a person charged with a crime not enumerated in the treaty is clearly settled by the recent decision of *Ex parte* Foss by the Supreme Court of California. It appeared in that case that the petitioner was indicted by a grand jury of Plumas County, California, for the crime of embezzlement. At the time he was in Honolulu. Upon a requisition from the governor of California he was surrendered by the Hawaiian authorities. The treaty between the United States and the government of the Hawaiian Islands in relation to the extradition of fugitives from the justice of either of such countries does not provide for the extradition of a person charged with the crime of embezzlement, and the warrant issued by the Hawaiian government for the arrest of the petitioner, and for his delivery to the agent appointed by the governor of California to receive him into custody, did not refer to the treaty, but the proceedings preliminary to the issuance of such warrant were conducted in accordance with the rules prescribed by the treaty to effect the extradition of a person charged with either of the offenses for which extradition is there provided. The petitioner claimed that his imprisonment under the circumstances as stated is illegal and sought discharge therefrom under the writ of *habeas corpus*. The court denied the writ, stating that while it is true that when a treaty provides for the extradition of fugitives charged with particular crimes, the reciprocal duty of delivering up to justice is confined to the particular cases for which the treaty has provided, yet the existence of a treaty which provides for extradition for certain crimes does not deprive either nation of the power and right to exercise its own discretion in cases not coming within the terms of the treaty. It is only to the extent that the treaty imposes an obligation to surrender persons charged with particular offenses that there is any restriction placed upon the sovereign right of the nation in which the fugitive is found to either permit or refuse to permit his arrest and return to the country from which he has fled. In other words, in relation to persons charged with offenses not named in the treaty, each government, as an incident of its sovereignty, may either grant or deny to the fugitive an asylum within its jurisdiction. This conclusion is so obviously correct that no extended argument is necessary to sustain it, and the principle is thus stated in section 269 of volume 2 of Wharton's International Law Digest: "The rule, '*Expressio unius est exclusio alterius*,' applies to extradition treaties, and under such treaties process can be sustained only for enumerated offenses. This, however, would not preclude in extraordinary cases, and an appeal, not on the basis of the treaty, but on the ground of comity, for surrender of a fugitive charged with a non-enumerated offense, when such offense is one which would justify such an extraordinary measure." The court cites U. S. v. Rauscher, 119 U. S. 407, wherein Mr. Justice Miller uses the following language: "It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering these fugitives from justice to the States where their crimes were committed for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties and apart from them, it may be stated, as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked, and it has never been recognized as among those obligations of one government towards another, which rest upon established principles of international law."

One of the points practically, though not in terms, decided in the Foss case illustrates a distinction between international and interstate extradition. It appeared that the accused was surrendered upon an indictment for embezzlement, and that, upon his motion, such indictment was set aside—presumably for technical irregularity. He was, however, immediately reindicted for the same offense—

embezzlement—and was held upon such second indictment. It was held in United States v. Rauscher the leading case on the subject—that when a defendant has been surrendered in pursuance of an extradition treaty, he cannot be placed upon trial for any other than the particular offense named in the application and proceedings. And this doctrine was substantially affirmed in the Foss case. But the principle has generally been denied in its application to interstate extradition, though the courts of one or two States still hold that as to interstate extradition a defendant cannot be placed upon trial for any other offense than that named in the extradition papers. The strong weight of modern authority is, however, the other way. The rule obtains as to international extradition because the contrary position might lead to breach of contract and bad faith.

NOTES OF RECENT DECISIONS.

CORPORATIONS — APPOINTMENT OF RECEIVERS—DIRECTORS.—The case of Edison v. Edison United Phonograph Co., 29 Atl. Rep. 195, decided by the Court of Chancery of New Jersey is instructive on the question of appointment of receiver to wind up a corporation. It was held that nothing short of present actual insolvency will warrant the appointment of a receiver to wind up a corporation. Expected insolvency at some time in the future is not sufficient. A court of equity, in the exercise of its general jurisdiction, may appoint a receiver of a corporation, either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders; but this power is always exercised with great caution, and only for such time and to such an extent as may be necessary to preserve the property of the corporation, and to protect the rights of its stockholders. So long as the directors of a corporation keep within the scope of their powers, and act in good faith and with honest motives, their acts are not subject to judicial control or revision. If the stockholders of a corporation disapprove of the company's management, conducted without fraud or gross abuse of trust, or consider their speculation to be a bad one, their remedy is to elect new officers, or sell their stock, and withdraw. Where the question is one of mere discretion in the management of corporate business by directors, remedy cannot be had by application to a court of equity. Where the majority keep within the scope of the powers of the corporation, no court has power to substitute the judgment of a minority of the directors for that of the majority.

PAROL EVIDENCE—CONDITIONAL DELIVERY OF SEALED INSTRUMENTS.—The Court of Appeals of New York decide in Blevitt v. Boorum, 37 N. E. E. Rep. 119, that delivery of an instrument to a party thereto when not relating to real estate may be shown to have been on a parol condition that it should not take effect till the happening or doing of something though the instrument be under seal, at least where it does not require a seal for its validity. Peckham, J., says:

The case of Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. Rep. 127, holds that a writing which is in form a complete contract, and which has been delivered, may be proved by parol evidence to have been delivered upon a condition that it was not to become a binding contract until the happening of some event in the future, and that such event had not occurred. The cases cited in the brief opinion fully bear out the statement. The plaintiff here contends that the authority of that case must be confined to contracts which are not under seal, and, as the contract here was a sealed one, the case has no application. Of course, the mere presence or absence of a seal upon a writing would seem to be a matter of the smallest importance upon the question now under consideration. The same reasons would apply with equal force for receiving or rejecting the contemporaneous parol understanding where the writing was sealed, as where the seal was absent. It is a question in each case as to whether there has or has not been an executed and completed agreement or act. Many of the old English cases held the doctrine that where there was a writing bearing upon its face the marks that it was fully and completely executed, if there were a delivery of the writing to the party himself, there could be no parol evidence that the delivery was upon a condition, or in escrow. The reason assigned in many cases was that such evidence would lead to the result that a bare averment, without any writing, would make void every deed. The word "deed" was not used in its restricted sense of a written instrument conveying land, or some interest therein, but in the sense that it was a writing of the party, and hence his act or deed. In Williams v. Green, Cro. Eliz. 884, the action was one of debt on a bill. There was no seal attached. The plea was that the bill had been delivered to the plaintiff as a schedule (a memorandum), upon condition that, if plaintiff delivered to defendant a horse upon a certain day, then the schedule was to be his deed,—otherwise not,—and that plaintiff had not delivered

the horse. The plaintiff demurred to the plea, and it was resolved by the whole court to be a bad plea, for a deed could not be delivered to the party himself, as an escrow, because then a bare averment without any writing would make void any deed. The decision was not based upon the question of a seal, and the paper was referred to as a deed simply by way of description of an act of the party in delivering a written instrument which ought not to be rendered void by a parol contemporaneous understanding or agreement. The reason would apply with equal force to all written instruments, sealed or unsealed. Other cases of a nature where the writings needed not to have been under seal, and where it was held that they could not be delivered conditionally to the party to the instrument, are cited in 2 Co. Litt. 276 (Phila. Ed. 1827; 1st Am. from last London Ed.). On the other hand, there is one case which decided that a writing obligatory could be delivered in escrow to the obligee (Hawksland v. Gatchel, Cro. Eliz. 835); but, after differences of opinion among the judges it was finally resolved otherwise in later cases, as stated in Coke, *supra*. These cases show that the rule preventing parol evidence of a delivery to the party upon condition was not founded upon the presence of a seal to the writing, but the rule was adopted because, when the words were contrary to the act (of delivery), the words were regarded as of no effect. for it was not what was said, but what was done, that was, in such case, to be regarded. Hence, a delivery to a party was said to be inconsistent with any condition attached to it, and a condition was in fact a contradiction of the writing; and parol evidence of the condition was therefore inadmissible. A different view was subsequently taken of this act of delivery. The courts said it was not a contradiction of the terms or legal effect of the writing, but it was proof, simply, that no contract had in fact been entered into. They said that the production of a writing purporting to be an agreement by a party, with his signature attached, afforded a strong presumption that it was his written agreement, but if at the time the parties agreed that the writing was not to take effect as an agreement until the happening of some event,—in other words, that it was agreed upon conditionally,—then it should not take effect until the happening of the event, or the fulfillment of the condition. Pym v. Campbell, 6 El. & Bl. 370. Crompton, J., in the above case, in speaking of an instrument under seal, said it could not be a deed until there was a delivery, and when there was a delivery that estops the parties to the deed, which was a technical reason why a deed could not be delivered as an escrow to the other party. He said the parties may not vary a written agreement, but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement, for they never had agreeing minds. In truth, however, the court of exchequer, in Bowker v. Burdekin, 11 Mees. & W. 127, had already distinctly stated that a delivery of a deed to a party might be in escrow, even though the condition were not in express words, if, from the circumstances attending its execution, it could be inferred that it was not delivered to take effect as a deed until a certain condition were performed. Baron Parke said in that case it was now settled law, though it was otherwise in ancient times, that, in order to constitute the delivery of a writing as an escrow, it was not necessary that it should be done by express words, but you are to look at all the facts attending the execution, and though, in form, it was an absolute delivery, if it can be reasonably inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will still operate as an escrow. The deed was in that case delivered to the party who was to take a benefit under it; and while the court held it was in fact an absolute delivery, the learned judges admitted that it might have been delivered conditionally to a party, and, if so, it would not take effect until condition performed. And in Gudgen v. Besset, 6 El. & Bl. 986, the lease of premises for a term of years was signed, sealed, and delivered to the party, although after such delivery the grantor retained the lease in his possession. The agreement was that it was not to take effect until lessee paid £100, £50 only being then paid. The court, from all the facts in the case held that the clear inference was that the instrument should not operate as a lease until full payment, and if there were such an agreement, though no express words of delivery as an escrow were used, it would not operate as a deed until payment was made, and consequently the lessee, although in possession of the premises, was tenant only from year to year, and not tenant under the deed; Campbell, C. J., holding that the formality of delivering the instrument to a third person as an escrow was not essential, when it was intended to operate as such. Looking at all the facts, the learned judge said it must have been the intention of the parties that the instrument should not operate as a lease till the money was paid, and that neither party intended that the interest in the term should vest till then. As a result of the examination of the English authorities, I think it is clear that the presence of a seal on a writing was not the reason for prohibiting parol evidence of a condition attached to a delivery to a party, but that, where parol evidence was disallowed, it was on the theory that otherwise it would be contradicting the writing. The rule was overthrown in England by the cases cited, which permit parol evidence that the delivery of a writing, although under seal, may be shown to have been under an agreement that it was not to operate as such until the happening of some future event.

In this State, in Lovett v. Adams, 3 Wend. 380, it was said by Savage, C. J., that if a bond be signed, and put into the hands of the obligee or a third person, on the condition that it shall become obligatory upon the performance of some act of the obligee, or any other person, the paper signed does not become the bond of the party signing the same until the condition precedent shall be performed. Until then, there is no contract. The court held that evidence of such facts should have been admitted. So, the presence of a seal was considered no obstacle to parol proof that the writing was delivered to a party to the instrument upon a condition which had not been performed. The rule in this State regarding deeds conveying real estate, or an interest therein, or agreements for the sale thereof, is that a delivery cannot be made to the grantee, or other party thereto, conditionally, or, as is said, "in escrow," and, when delivered to a party, the delivery operates as once, and the condition is unavailable. Gilbert v. Insurance Co., 23 Wend. 43; Worrall v. Munn, 5 N. Y. 229; Braman v. Bingham, 26 N. Y. 483; Wallace v. Berdell, 97 N. Y. 13, 25. Whether there is any sound basis for a distinction between cases relating to real estate and other kinds of written instruments, it is not now important to inquire, for the rule that instruments of the former character cannot be conditionally delivered to a party is too firmly established in this State to be overruled, or even questioned. In the case in 23 Wend., *supra*, Bronson, J., says it is one of the

cases in which the law fails to give effect to the honest intention of the parties for the reason that they have not adopted the proper legal means of accomplishing their object. In Arnold v. Patrick, 6 Paige, 315, the writing involved was a deed of land; and the remark of the chancellor, that the rule applied to any sealed instrument, was beyond the question. He refers as authority for his statement to Thoroughgood's Case, 9 Coke, 137a, reported in volume 5, at page 241 of the London edition of Coke's Reports (1826). The writing in that case was a deed conveying lands, but cases are referred to in the report where bonds were thus delivered, and it was held that no condition could be attached to a delivery to a party. I have already stated, in reviewing the English cases, that the rule was not founded upon the presence of a seal, but because the delivery could not be contradicted by parol evidence of a condition attached thereto. Those old English cases have been passed over, and substantially overruled, by the English courts, so far as to hold that the delivery, even of a sealed instrument, to a party, could be made conditionally; and the case in 3 Wend., *supra*, shows that a bond could be delivered conditionally to a party. In Cocks v. Barker, 49 N. Y. 107, parol evidence was admitted to show that the bond was delivered conditionally, and the trial court found against that fact. In this court it was stated that the evidence was not admissible, because a deed could not be delivered to a party upon condition; citing Worrall v. Munn and Gilbert v. Insurance Co., *supra*. It was not necessary to the decision, and I think the doctrine that a bond could not thus be delivered is not borne out by the cases in this State, and certainly not by the later cases in England already cited. But a bond imports the existence of a seal, and the latter is requisite to the legal existence of a bond. The instrument in this case was an ordinary agreement, not requiring a seal for its validity; and we think the rule as to sealed instruments, however far it may be carried in regard to such instruments as require a seal for their validity, should not be extended, in any event, to those cases where the instrument is, in law, not in the nature of a specialty, and where the presence of a seal is totally unnecessary to its validity. I think myself the rule should not extend beyond what seems to be the settled law in this State in regard to deeds or writings conveying, or relating to the conveyance, of real estate, or some interest therein; but in this case it is not necessary to now go further than to hold the rule inapplicable to an instrument not in any way relating to or affecting real estate, and which does not require a seal for its validity, the seal being in such case, and for this purpose, regarded as surplusage, and the instrument should be held to come within the rule laid down in Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. Rep. 127, already cited. The other cases cited in plaintiff's brief have been examined. With the exception of Van Bokkelen v. Taylor, 62 N. Y. 105, they hold simply that parol evidence of a contemporaneous parol agreement, outside of, and varying the terms of, a written contract, is not admissible. We do not hold the contrary, but simply hold the parol evidence of an agreement that the writing should not take effect upon delivery until the happening of some condition is admissible in such a case as this. Van Bokkelen v. v. Taylor, *supra*, was a case of a composition release by creditors of a common debtor; and it was held that evidence of a secret condition attached to the execution or delivery of the release by one of the creditors was inadmissible, as such an agreement in regard to a composition release was void in any event.

ILLEGAL CONTRACT — PROCUREMENT OF TESTIMONY.—In Quirk v. Muller, 36 Pac. Rep. 1076, decided by the Supreme Court of Montana, it was held that a contract, by which a party to a suit employs another to search for witnesses and to procure such other testimony as will secure a favorable verdict, is void as against public policy. The court says:

The Supreme Court of Illinois took occasion, in the case of Gillett v. Board, 67 Ill. 256, to treat this subject in very vigorous and pertinent language. A case was about to be tried involving the legality of an election to determine whether the county should subscribe for certain railroad bonds. The legality of the election which had been held being questioned, and the county supervisors, apparently desiring to overthrow the result of the election made certain contracts as to the procuring of testimony to attack the result of that election. In the contract which the supervisors made with one McNeal, they provided as follows: "That if he (McNeal) will hunt up testimony, and prepare the same, and present it to the proper authorities who may be authorized to receive it, and, after said testimony or evidence is fully received and shall be acknowledged as legal, then, for said services, said McNeal is to receive from Logan County the following amounts: For ten illegal votes, so proved, $100; for ten other illegal votes, so proved, $200; for ten other illegal votes, so proved, $300; for ten other illegal votes, so proved, $400; for ten other illegal votes, so proved, $400; for ten other illegal votes, so proved, $400; for ten other illegal votes, so proved, $400. The above mentioned illegal votes must be in place of, answer to, or represent certain unknown names on the East and West Lincoln poll books of the election above mentioned. The condition of this obligation is such that the said McNeal is to pay all his own individual expenses and the expenses of any parties whom he may employ in preparing such testimony, and finding such testimony, and finding such witnesses; and that above amount, or any part of the same, shall not be due or payable until the illegality of such votes is legally proven. It is further agreed that, in case the County of Logan is finally released from any liability to pay said bonds now in dispute between said county and the P., L., and D. R. R. Company, by means of proving the majority in said election to be illegal, the County of Logan further agrees to pay said M. B. McNeal the sum of twelve hundred dollars, which said amount is to be in addition to the scale of prices above mentioned, and payable only after the courts have decided the case in favor of the said county." The Supreme Court of Illinois, in passing upon this contract, said:

"The evidence disproved the actual use by the committee of any corrupt means or any corrupt design, on their part, in the use of the money. But the contracts themselves are pernicious in their nature. They created a powerful pecuniary inducement on the part of the agents so employed that the testimony should be given of certain facts, and that a particular result of the suit should be had. A strong temptation was held out to them to make use of improper means to procure the needful testimony, and to secure the desired result of the suit. The nature of the agreement was such as to encourage attempts to suborn witnesses, to tamper with jurors and to make

use of other 'base appliances' in order to secure the necessary results which were to bring to these agents their stipulated compensation. The tendency of such arrangement must be to taint with corruption the atmosphere of courts, and to pervert the course of justice. A pure administration of justice is a vital public concern. It tends to evil consequences that any such venal agency as is constituted by these contracts should have a part in the conduct of judicial proceedings where the attachment of right and justice is the end. Should such contracts of this character receive countenance, we might, among the multiplying forms of agency of the time, have to witness the scandalous spectacle of a class of agents holding themselves out to the public as professional procurers of desired testimony for litigants in court, for pay, contingent upon success in their suits. In Marshall v. Railroad Co., 16 How. 314, it was held that a contract or a contingent compensation for obtaining legislation was void by the policy of the law. With much greater reason, we think, should the contracts under consideration be held vicious. We cannot sanction them. On account of their corrupting tendency, we must hold them to he void, as inconsistent with public policy. Gillett v. Board, 67 Ill. 256. See, also, Patterson v. Donner, 48 Cal. 369."

We fully concur in the views expressed in these cases, and we are of opinion that the contract under consideration falls within the objectionable class. To be sure, under the contract the plaintiff, Quirk, may have performed only innocent acts, and there is nothing to indicate that both his intentions in making the contract and his acts in carrying it out, were other than wholly innocent and lawful. But the contract was just such a one as to encourage an unlawful act. It invited subordination of perjury. It held out a large reward for success. The amount claimed by plaintiff was some $1,800. The obtaining of this large sum depended upon plaintiff procuring testimony which would win the lawsuit. The law does not tolerate the offering to any one, no matter how virtuous, of such temptations to crime. The evils and vices of such a contract are strongly stated in the language of the Illinois court, quoted above. It would, indeed, be a sad spectacle to see springing up in this State the business of procuring testimony sufficient to win lawsuits. We regretfully express the fear that perhaps such a business might find a patronage. But from such a result we will secure ourselves by declaring void a contract the manifest tendency of which is to present the direct temptation and the great inducement to one to procure subornation of perjury.

MUNICIPAL CORPORATION — FIRE LIMITS—NUISANCE—INJUNCTION.—**The Supreme Court of Indiana decide in Kaufman v. Stein that an injunction lies to prevent the removal of a wooden building to a place within the fire limits in violation of a city ordinance, and the location of it within 10 feet of plaintiff's house, making the danger thereto from fire imminent, and increasing the cost of insurance; that under Rev. St. 1881, § 3106, authorizing the common council to prevent the erection of wooden buildings in such part of the city as they may determine, the common council can prohibit the removal of such buildings from a point within or without to a point within the fire limits; and that, under the "general welfare" clause of its charter, a city has power to establish fire limits, and regulate the erection and removal of wooden buildings.** Dailey, J., says, *inter alia:*

Upon the proposition "that the common council of the city of Terre Haute had no power to pass the ordinances in question," it is insisted that, "inasmuch as the charter had granted certain specific powers to the city, · · · none other could be exercised." The charter provisions are found in Rev. St. 1881, § 3106 (Burns' Rev. St. 1894, § 3541, subd. 32), which provides that the common council shall have power "to prevent the erection of wooden buildings in such part of the city as the common council may determine." Also in sections 3198 and 3199, Rev. St. 1881, being 3661 and 3662, Burns' Rev. St. 1894. It is clear that the specific power granted by subdivision 32, *supra*, is to prevent the "erection" of wooden buildings. Nothing is said about the "removal," and it is insisted, therefore, that so much of the ordinance as attempts to prevent the removal of wooden buildings within or without the fire limits is *ultra vires* and void, and in contravention of common right of an owner to do as he pleases with his own property. The provisions of the ordinance are, in brief, as follows: Section 1 defines the fire limits; section 2 provides that no frame building shall be erected within the fire limits; section 3 provides a penalty for removing or assisting to remove any frame building from a point within or without to a point within the said fire limits; section 4 provides that any building so erected or removed shall be deemed a nuisance; section 5 provides against the location of lumber yards within said limits. Appellant admits that the authority to pass an ordinance against the removal of a wooden building is not specifically granted, but insists that it comes within the intention of the legislature; that the object of granting the power to the city was to enable the common council to take precautions against the destruction of the city by fire. In the case of Clark v. City of South Bend, 85 Ind. 276, the same point was presented that is now urged, but the court said: "This is a more narrow view of the subject than the books warrant counsel in assuming." If the ordinance in question concerning removals of buildings is so in derogation of common right as to be void, and if the common council is restricted in its legislative acts to such ordinances only as are literally in compliance with the statutes, it could not prohibit the removal of frame buildings, but only the erection thereof within the limits, and any person so desiring could construct his house outside of the fire limits, and then remove it to a place within, and by a series of removals there might be no end of frame buildings brought within such limits. Such construction would permit parties to accomplish indirectly what they could not do directly, and so evade the ordinance as to render it nugatory. If the power is to be strictly construed, what is there to prevent the erection of a lumber yard upon each vacant lot of the city? The express power is "to prevent the erection of wooden buildings." A lumber pile is not a building, and there is no express power given the city to prevent a lumber yard within the fire limits; yet who would question the inherent right of the council, in the exercise of its police power, to provide against and inhibit the heaping of such combustible material so as to endanger property rights? In the case of Clark v. City of South Bend, *supra*, the ordi-

nance prohibited the accumulation of straw. The court said: "There can be no doubt that the legislature meant to confer broad powers upon municipalities in the matter of providing against danger from fires." And the ordinance was held valid, even though, as here, there was no express power. It is simply a police regulation, and as is said in Brady v. Insurance Co., 11 Mich. 425, "of the power of the common council to pass the ordinances in question we have no doubt. They contravene no provision of the constitution as we read it, and they were made in the exercise of a police power necessary to the safety of the city." It is provided in section 3155, Rev. St. 1881, being section 3616, Burns' Rev. St. 1894, that "the common council shall have power to make other by-laws and ordinances not inconsistent with the laws of the State, and necessary to carry out the object of the corporation." We think the ordinance in question violates no provision of the constitution or laws of this State, and that, without any charter provision, the ordinance would be a valid act, based upon an inherent right. We are aware that the doctrine of "inherent right" is disputed in some of the States as appears by the following authorities: State v. Schuchardt (La. 1890), 7 South. Rep. 67; Kneedler v. Borough of Norristown, 100 Pa. St. 368; City of Des Moines v. Gilchrist, 67 Iowa, 210. 25 N. W. Rep. 136; Pye v. Peterson, 45 Tex. 312. But in 15 Am. & Eng. Enc. Law, p. 1170, it is said: "The decided weight of authority in this country is that municipal corporations have the power, under the general welfare clauses usually contained in their charters, without express legislative grant, to establish fire limits, forbidding the erection of wooden buildings, etc." To support this doctrine the author cites a great number of decisions, and in note 1 says: "These cases all rest on solid principle, for the rule has always been that a municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens against fire,"—citing the cases, among others, of Clark v. City of South Bend, *supra;* Baumgartner v. Hasty, *supra;* Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659; Kent, Comm. 339.

The remaining question to be considered is: Was there an erection of a building, or a removal thereof, within the meaning of the ordinance? In some of the States the removal of a building, and locating the same upon another spot, is held to be an "erection." Wadleigh v. Gilman, 12 Me. 403. Also, "to enlarge or elevate a wooden building so as to alter its character is an erection of such building within the meaning of the ordinance." Douglass v. Com., 2 Rawle, 262. In Connecticut, however, a removal taking place wholly within the fire limits is not such "erection." Dagget v. State, 4 Conn. 60; Booth v. State, *Id.* 65; Tuttle v. State, *Id.* 68; State v. Brown, 16 Conn. 54; Brown v. Hunn, 27 Conn. 334. The word "erect" is defined in Anderson's Law Dictionary, p. 410: "To lift up, build, construct; as, to erect a building, a fixture. Removing a building is not erecting it, nor is elevating or materially changing it." The weight of authorities supports the position held by the courts of Connecticut on this question. It is insisted by the appellee that, as the act threatened does not contemplate the taking of the house from the lot it occupies, it would not constitute a removal within the meaning of the ordinance. Webster defines the word "remove" to be: "To move away from the position occupied; to cause to change place; to displace; as, to remove a building." Of course, the removal must be a substantial one. The mere turning of a building, or the change of the foundation so as to permit the erection of a bay window, could hardly come within the rule. But the fact that the structure is not to be taken from the lot upon which it was originally built, or where it stands, cannot be the criterion.

EVIDENCE — EXPERT TESTIMONY — HANDWRITING.—In Grant v. Harkness, 36 Pac. Rep. 739, the Supreme Court of Kansas hold that on the trial of an action on a promissory note, where the principal issue is as to the genuineness of the defendant's signature thereto, it is error to permit the defendant to present to plaintiff's witnesses, who are called to testify as experts, false signatures to notes prepared for the purpose of testing the ability of the witnesses to detect a forgery, and to cross-examine such witnesses as to such false signatures, and thereafter to introduce such signatures in evidence, and prove by another witness the fact that he wrote them himself, and that the rule that writings to be used as a basis for the comparison of handwritings must be admitted to be genuine by the party against whom they are sought to be used, or at least clearly proven to be so, applies as well to writings used on the cross-examination of witnesses as on the direct. Allen, J., says:

It is said in some of the earlier cases that the rule in the English common-law courts prior to the act of parliament making such evidence admissible was that evidence by comparison of handwriting could not be allowed as independent proof unless in relation to ancient writings, concerning which an exception was allowed; and there are cases in this country upholding this doctrine. Berryhill v. Kirchner, 96 Pa. St. 489; Strother v. Lucas, 6 Pet. 763; Kirksey v. Kirksey, 41 Ala. 626; Kinney v. Flynn, 2 R. I. 319. The admissibility of such testimony has been considered and sustained by this court in various cases. Macomber v. Scott, 10 Kan. 335; Joseph v. Bank, 17 Kan. 256; Abbott v. Coleman, 22 Kan. 250; State v. Zimmerman, 47 Kan. 245, 27 Pac. Rep. 999. In England now, and in all of the United States, the testimony of experts seems to be admitted by the courts. The divergence of opinion in the various tribunals is mainly as to the basis of comparison. In some States it is held that comparison can only be made with other papers already in evidence in the case. People v. Parker (Mich.), 34 N. W. Rep. 720; Randolph v. Loughlin, 48 N. Y. 456; Haynes v. McDermott, 82 N. Y. 41; Yates v. Yates, 76 N. C. 142. In other States it is held that comparisons may be made with writings introduced in evidence solely for the purpose of comparison, but that the genuineness of such writings must be admitted by the party against whom they are used (Dietz v. Bank [Mich.], 37 N. W. Rep. 220; Wagoner v. Ruply, 69 Tex. 700, 7 S. W. Rep. 80; Shorb v. Kinzie, 80 Ind. 500; Merritt v. Straw [Ind. App.], 33 N. E. Rep. 657), while in others it is said that writings with which comparisons may be made must be admitted or proved to be genuine. Where the latter rule prevails, it is generally said that the proof must be strong and clear, and sometimes that

the genuineness must be proven clearly and beyond a reasonable doubt. Bragg v. Colwell, 19 Ohio St. 407; Pavey v. Pavey, 30 Ohio St. 600; Richardson v. Newcomb, 21 Pick. 315; Winch v. Norman, 65 Iowa, 186, 21 N. W. Rep. 511; Com v. Coe, 115 Mass. 481; Rowell v. Fuller's Estate, 59 Vt. 688, 10 Atl. Rep. 853; Hanriot v. Sherwood, 82 Va. 1; Sankey v. Cook, 82 Iowa, 125, 47 N. W. Rep. 1017.

It is urged by counsel for defendant in error that it was proper to test the capacity of the plaintiff's expert witnesses to detect a forged signature in the manner resorted to in this case, and that for that purpose signatures designed to deceive may be used; that the failure of the witness to point out which are genuine and which forged signatures conclusively shows that he is not an expert, and therefore his testimony is not to be credited. No cases are cited by him in support of this position. The only case we are able to discover which in any manner upholds that position is that of Thomas v. State, 103 Ind. 419, 2 N. E. Rep. 808. No authorities are there cited, and there is not enough stated in the opinion to give a clear idea of the question ruled on in that case. Wharton on Evidence (volume 1, § 710) seems also to support that view. On the other hand, the question has been fully considered in neighboring States, and such mode of examination held inadmissible. In the case of Rose v. Bank, 91 Mo. 399, 3 S. W. Rep. 876, "the cashier testified that he knew the plaintiff's handwriting. He examined the disputed check and several other checks, then in evidence for other purposes, and conceded to be genuine, and stated that the signatures to all of the checks were in the handwriting of the plaintiff; that they were all alike. On cross-examination counsel for plaintiff placed before the witness the name of W. P. Rose, written upon two blank checks, concealing from his view the other portions of the checks, and asked him in whose handwriting these signatures were. Witness answered that if checks, signed as these were, were presented to the bank, he would pay them as Rose's checks. Plaintiff, in rebuttal, called another person, who stated that he wrote the name of W. P. Rose on the blank checks, during the progress of the trial." After reviewing the authorities, the court says: "The rule which excludes extrinsic papers and signatures is substantially the same in the direct and cross-examination, as will be seen from the foregoing authorities. Papers not a part of the case, and not relevant, as evidence, to the other issues, are excluded mainly on the ground that to admit such documents would lead to an indefinite number of collateral issues, and would operate as a surprise upon the other party, who would not know what documents were to be produced, and hence could not be prepared to meet them. The reason of the rule applies to the cross-examination with as much force as to the direct examination. The signatures should have been excluded, whether used to test the witness as an expert or to test his knowledge of the handwriting of the plaintiff. We cannot say the evidence did no harm. The error was in the reception of evidence on the only disputed fact in the case, and the judgment must be reversed and the cause remanded." In Massey v. Bank, 104 Ill. 327, on cross-examination of a witness who had testified with reference to the genuineness of the signature, a paper having the party's name written on it 16 times was shown to the witness, and he was asked to pick out the genuine signatures. The court ruled excluding the question, and the Supreme Court affirmed the ruling, and, after commenting on what is said in Wharton on Evidence, says: "Without stopping to inquire as to the general correctness of this observation, and especially where the rule obtains, as in this State, that evidence of the genuineness of handwriting based on the comparison of hands is not admissible, we think that, at least in reference to test paper, got up for the occasion, as in the present case, there was no error in not allowing the course of cross-examination proposed." To the same effect is Tyler v. Todd, 36 Conn. 218. Whether the writing with which comparison is sought to be made must be admitted to be genuine by the party against whom it is used has never been decided by this court, nor is it necessary in this case to decide that question, for here a number of writings, not shown by evidence to be genuine, were introduced in evidence.

NATIONAL BANK—GUARANTEE OF COMMERCIAL PAPER.—In Thomas v. City National Bank, 58 N. W. Rep. 943, the Supreme Court of Nebraska decide that while a national bank may not lend its credit for the accommodation of others, still it may guaranty the payment of commercial paper as incidental to the exercise of its power to buy and sell the same. It appeared that A, being indebted to a national bank, and being the holder of certain negotiable notes, indorsed them generally, and delivered them to the president of the bank, who negotiated them for value to C, at the same time executing in the name of the bank a written guaranty of payment. From the proceeds of the sale, A's debt to the bank was canceled. It was held first, that the guaranteeing of the notes under such circumstances was within the powers of the bank; second, that the authority of the president to execute the guaranty would be conclusively presumed in favor of the purchaser acting without notice to the contrary; third, that the retention and enjoyment by the bank of the proceeds of such transaction constituted a ratification of the president's act. Irvine, C., says:

The evidence on the part of the plaintiff tended to show that the notes and mortgage were made and delivered to Paul in payment for an interest in a brickyard; that Paul was then indebted to the bank in the sum of about $7,000, $5,000 of which seems to have grown out of the brickyard business, but constituted a debt which Paul testifies he had individually assumed. Bostwick, the president of the bank, took the notes and mortgage. Paul, having indorsed the notes, sold them to the plaintiff, writing the guaranty thereon before the transmission. The payment was made by two drafts of the National Bank of Commerce of Kansas City upon the National Bank of the Republic of New York. Each was drawn to the order of the defendant bank. Each draft bears the following indorsement: "Pay to the American Exchange Bank, New York, or order for collection, account of City National Bank, Hastings, Neb., J. M. Ferguson, cashier." Ferguson was cashier of the defendant bank He testifies he did not place the indorsement upon the

drafts, and that he never saw them before the trial, but that it was not his duty to make such indorsements; that they were generally made by the remittance clerk. The drafts were paid, and from the proceeds Paul's debt to the bank was canceled, and the remainder passed to his credit. The method of book-keeping pursued in order to accomplish this result is left doubtful by the evidence. But the evidence is uncontradicted that this result was reached. Subsequently, one note of the series was paid plaintiff in a draft through the City National Bank. A letter signed by Bostwick indicating that the bank paid it was excluded from evidence. The theory of the plaintiff is that the guaranty was within the scope of the bank's authority and that of the president, but, if not so, the bank, having adopted the benefit of the transaction by receiving the proceeds in satisfaction of Paul's debt, Bostwick's acts were ratified. The theory of the defendant is that the arrangement was a scheme between Bostwick, the makers, and the payee of the notes, constituting the brick company, to obtain money; that the bank never owned the notes; and that the president's act was not within the scope of his authority, but amounted to a forgery, committed by him while acting individually, and that the guaranty was, in any event, a pledge of the bank's credit, and *ultra vires*. From Rich v. Bank (7 Neb. 201), we quote the following: "As a general rule, the officers of a bank are held out to the public as having authority to act according to the usage and course of business of such institutions, and their acts within the scope of their authority bind the bank in favor of third persons having no knowledge to the contrary. And it may also be laid down as a rule that no officer of a bank can bind it by a promise to pay a debt which the corporation does not owe and was not liable to pay, unless the bank authorize or has ratified the act." In People's Bank v. Manufactures' Nat. Bank, 101 U. S. 181 one Pickett made his notes for $50,000, payable to his own order, indorsed them, and delivered them to the National bank, to be negotiated to the plaintiff. The vice-president of the National bank, with the knowledge and consent of the president and cashier, but without any authority from the board of directors, or from a majority of them as individuals, transmitted the notes to the plaintiff, with a written guaranty signed by himself. The plaintiff's account with the defendant was debited with $50,000 on account of the notes. At the same time Pickett's paper held by the defendant was canceled to the same amount. It will be observed that in all its essential features this case was similar to the one under consideration, according to plaintiff's theory of the facts. The language of Mr. Justice Swayne in that case is therefore entirely appropriate to this, and, so far as it concerns the law of the case, we quote it entire in lieu of an original discussion: "The National bank Act (Rev. St. p. 993, § 5136), gives to every bank created under it the right 'to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, *by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt*, by receiving deposits,' etc. Nothing in the Act explains or qualifies the terms italicized. The hand-over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse 'Waving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that under the circumstances of this case it was competent for the defendant to give the guaranty in question. It is to be presumed the vice-president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequence. The doctrine of *ultra vires* has no application in cases like this. (Merchants' Bank v. State Bank, 10 Wall. 604.) All the parties engaged in the transaction, and the privies, were agents of the defendant. If there were any defects of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal words. These facts conclude the defendant from resisting the demand of the plaintiff. (Whart. Ag. § 89; Bigelow, Estop. 423; Railroad Co. v. Howard, 7 Wall. 392; Kelsey v. Bank, 69 Pa. St. 426; Steamboat Co. v. McCutcheon, 13 Pa. St. 13.) A different result would be a reproach to our jurisprudence." The case involving to a certain extent the construction of the National banking Act, the decision referred to is probably binding upon this court, but, whether it is or not, we accept it as a correct statement of the law.

NEXT OF KIN.

Is the surviving husband or wife "next of kin" to a deceased husband, or a deceased wife: 1. In the construction of wills; 2. Under statutes of descent and distribution; 3. Under statutes granting the right of administration; 4. Under statutes giving right of action for causing death. It cannot be expected that this brief article shall comprehend the entire scope of this subject, but it, doubtless, will aid some toil weary brother, who desires, at least, a little light on this question.

1. More than two hundred years ago Lord Coke stated that which is about as true now as it was then: "Wills and the construction of them do more perplex a man than any other learning; and to make a certain construction of them, this *ex cedit jurisprudentum artem*."[1] Ordinarily, the words "next of kin," do not include a widow. They mean relatives in blood.[2] It is said that,

[1] Keteltas v. Keteltas, 28 Am. Rep. 156.

[2] Keteltas v. Keteltas, 28 Am. Rep. 157, 72 N. Y. 312; Murdock v. Ward, 67 N. Y. 387; Luce v. Dunham, 69 N. Y. 36; Haraden v. Larrabee, 113 Mass. 430; Garrick v. Camden, 14 Ves. 372; Wilkens v. Ordway, 59 N. H. 378; Tillman v. Davis, 95 N. Y. 17. And in general it may be said that husband and wife not being related to each other by blood, are not "next of kin" to each other. 16 Am. & Eng. Encyclo. of Law, 704, and cases cited. See, also, Irving's Appeal, 106 Pa. St. 176. For the manner of computing "next of kin" see Woerner's American Law of Administration, 150; Williams on Executors, 425.

"the primary object of all construction of wills is, in each case, to ascertain the intention of the testator, and to give effect to that with the rules of law. The words 'heirs,' 'next of kin,' may be so used in association with other language, and under such circumstances as to show an intention to include others than blood relatives. But in the absence of anything showing a different intention they must be held to mean what they primarily import, relatives in blood."[3] Yet the intention of the testator is to be gathered from the meaning of the words in the will, and from those words alone. Still the testator may be supposed to have used the words with reference to the state of his family, his property, and all other circumstances surrounding him and his affairs, hence extrinsic evidence will be received of those facts and circumstances to enable the court to ascertain the real meaning of the words used by him in his will.[4] And the intention of the testator controls.[5] Unless it violates the rules of law, and if it does the intention will fail of effect.[6] The whole instrument must be considered.[7] "Where a devise or bequest is made to the next of kin without reference to the statute, only those persons take who strictly answer this description," but if "the testator refers expressly to the next of kin according to the statute, and does not state how they are to take, the beneficiaries take according to the proportions directed by the statute."[8] The words "next of kin" do not include a husband or a wife, unless accompanied by other words clearly manifesting a purpose to extend their signification, the mere reference to the statute of distributions will not have that effect.[9] And a devise to "legal heirs" will not include the husband, if the will itself shows that he was not intended to be included therein.[10] It is said that English text writers make four classes of persons who take personalty beneficially by way of succession: 1. Next of kin as computed by the civil law; 2. Next of kin under the statutes of distributions; 3. The wife who shares under the statute of distributions but is not next of kin; 4. The husband, who is said to take personalty of his wife by virtue of marital right and not under the statute at all. But that so technical a distinguishing between "next of kin" is insuitable to the wants and conditions of this country, and the rights of kindred in the various States, are constantly determined by the local statutes, and that "we have come to use 'next of kin' in a sense relative to such local legislation as may apply, with little regard to the original statute, and much less to meaning which the civilians attached to the term." That we consult our written law to determine the rights of the widow or the surviving husband in the estate of the deceased, and that this is important in considering the intention of the testator to be derived from the language of the will.[11] It is said that the word "heir" pertains to realty, while "next of kin" applies to personalty. That the heir or next of kin of a deceased intestate is one who succeeds to all or a part of the deceased's estate by right of blood; or better, one who takes the property under a statute of descent and distribution. That the rights of the widow or widower to such property of the deceased husband or wife arises out of the marriage relation and is generally independent as to whether or not the deceased left a will, and strictly speaking under both of the definitions the widow or widower is not an heir or next of kin. "But in many States the widow or widower are named as heirs and next of kin in statutes of distribution and descent; and under such statutes in this limited sense a widow or widower may be heir or next of kin of her de-

[3] Tillman v. Davis, 95 N. Y. 30, 47 Am. Rep. 1; Wetter v. Valker, 62 Ga. 142, 47 Am. Rep. 215.

[4] Hunt v. White, 24 Tex. 652; Ehrenberg v. Succession, 99 Am. Dec. 729; Murkock v. Ward, 67 N. Y. 387, 392; Peet v. Commerce, etc., 70 Tex. 522, 8 S. W. Rep. 204.

[5] Peet v. Commerce & E. S. Ry. Co., 70 Tex. 522, 8 S. W. Rep. 203; Murdock v. Ward, 67 N. Y. 387.

[6] Brattle Sq. Church v. Grant, 63 Am. Dec. 725.

[7] German v. German, 67 Am. Dec. 451; Peet v. Commerce, etc., 70 Tex. 522, 8 S. W. Rep. 204, 11 Am. & Eng. Encyclo. of Law, 372.

[8] 16 Am. & Eng. Encyclo. of Law, 705 and 707 and cases cited. See Irving's Appeal, 106 Pa. St. 176; Fielden v. Ashworth, L. R., 20 Eq. Cas. 410, 412.

[9] Haraden v. Larrabee, 113 Mass. 430; Hascall v. Cox, 49 Mich. 435.

[10] Peet v. Commerce, etc., 70 Tex. 522, 8 S. W. Rep. 204.

[11] Schouler on Wills, § 543. See, also, Irving's Appeal, 106 Pa. St. 216, and Hascall v. Cox, 49 Mich. 435, cited. In this last case it is said that "Cases are numerous in which the word 'heirs' in a will have been construed as designating the persons who should take as "next of kin" and that, "In Re Steevens' Trusts, L. R., 15 Eq. 110, a legacy of 500, to the heirs of my late brother Joseph Steevens', was held to intend his next of kin, and that his children and widow if any would share it." This was, however, under construction of the word "heirs" by way of the substitution.

ceased husband or his deceased wife. These terms are, however, often used simply as a *discriptio* or *designatio personæ*, and according to the apparent intention of the legislature in making the law or of the party in making the instrument the widow or widower is included or excluded."[12]

2. Under the statute of descent and distribution any person may be an heir that the statute makes such. It seems to be purely a question of statutory law. In a State where the local statute has prescribed who shall be the heirs of a deceased person, it is said: "The statute of this State has covered the entire ground, and, therefore, the common law authorities, and decisions and statutes of other States, with respect to who are heirs or who inherit, have but little application in this State. The statute may make any person an heir. An heir in law is simply one who succeeds to the estate of a deceased person. In this sense the wife is an heir of her deceased husband,"[13] or next of kin.[14]

3. The right to administer on the estate of a deceased husband or of a deceased wife, by the surviving widower, or surviving widow, is not based on the matrimonial contract, but it exists by virtue of some statute, but it is said that where the statute gives this right, the surviving one must be named as husband or widower, or widow, for he or she does not take as "next of kin."[15]

4. In several States the statutes provide in substance that an action may be brought for wrongful act, neglect, or default of any person or corporation resulting in death to the person injured. The action is intended for the benefit of "the widow, children, or next of kin, or for the widow and next of kin, in some States for the husband, widow and heirs." In some States the action may be maintained by the widow, husband, parent, or other person entitled to the proceeds. "But generally the suit is brought by the personal representative for the benefit of the persons named in the statute, not as representing the estate in such cases, but the person for whose benefit the remedy is given.[16] But in statutes giving the proceeds to "widow" or to "widow, children or next of kin" or to "widows and next of kin," is the husband entitled to share in the proceeds obtained by the action of next of kin? The amount recovered is not assets of the estate,[17] although the administrator is liable to the beneficiaries for a misapplication of the funds.[18] "Husband and wife, as such, are not of kin to each other in a legal sense, and the husband cannot take under a settlement limited to the next of kin of his wife."[19] It has been held in Georgia, that the husband has no action for the killing of his wife.[20] And while there are cases which speak of the husband as succeeding to the wife's personalty as her next of kin,[21] yet it has been held that where the statute provided that the action is for the "exclusive benefit of the widow and next of kin," the husband is not entitled to share in the proceeds of the action.[22] While under a statute with the same provision, that is, for the "exclusive benefit of widow and next of kin of such deceased person," another State has held that the surviving husband is the next of kin to his wife within the meaning of said act, and as such, is entitled to share in a judgment obtained, and if there be no children he is entitled to the whole of the proceeds of the action. The court, in deciding, noted the decision of New York apparently to the contrary, but called attention to the difference in the statutes of descent and distribution of the two States.[23] In some States the action for causing death is given to the personal representative of the

[12] Stewart's Marriage and Divorce, § 457. See, also, Chaffee's Appeal, 56 Mich. 244; Bishop on the Written Law, § 4; Woerner on American Law of Administration, 902, 905.

[13] M'Kinney v. Stewart, 5 Kan. 392. See, also, Gibbon, 40 Ga. 562; Unfried v. Hebener, 63 Ind. 67; Furguson v. Stuart, etc., 14 Ohio, 146.

[14] Steel, Adm'r, v. Kurtz *et al.*, 28 Ohio St. 196; Wiesner v. Zann, 39 Wis. 188. See Stewart's Husband and Wife, § 22.

[15] Stewart's Marriage and Divorce, § 456. See, also, Woerner on American Law of Administration, 521; Schouler on Executors, §§ 99, 100.

[16] Woerner's American Law of Administration, § 295, where the statutes of the various States are indicated. For an article on "Statutory Liability for Causing Death," followed by a copy of Lord Campbell's Act, see American Law Register, Vol. 28, p. 577.

[17] Railway Co. v. Cutter, 16 Kan. 568; Perry v. St. Joseph, etc. W. R. R. Co., 29 Kan. 420; Baker v. Railroad, 91 N. C. 308; Hicks v. Barnett, 40 Ala. 291; Dickins v. N. Y. Central R. Co., 23 N. Y. 158.

[18] Perry v. Carmichæl, 95 Ill. 519.

[19] Dickens v. N. Y. Central R. Co., 23 N. Y. 158.

[20] Georgia R. R. Co. v. Winn, 42 Ga. 331; Womack v. Cent. R. & B. Co., 5 S. E. Rep. 63.

[21] Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 206, and cases cited; Fettiplace v. Gorges, 1 Ves. 46.

[22] Drake v. Gilmore *et al.*, 52 N. Y. 389; Dickins v. N. Y. Cent. R. R. Co., 23 N. Y. 158.

[23] Steel, Adm'r, v. Kurtz *et al.*, 28 Ohio St. 191.

deceased for the "exclusive benefit of the widow and children, if any, or next of kin to distribute in the same manner as personal property of the deceased," and where "no personal representative is or has been appointed, the action may be brought by the widow, or where there is no widow, by the next of kin of such deceased."[24] As already stated above in some States under the words "next of kin," the husband is held to be included, and in others he is held to be excluded.[25] Now, under such a statute, can the husband, on the death of the wife, under actionable circumstances, maintain the action as "next of kin?" It has been held that the husband cannot maintain the action as next of kin.[26] Yet it seems that where the husband is the real party intended, and gets the proceeds of the action as next of kin, that under such a statute there is no valid reason against his maintaining the action as next of kin, in States where he is held to be the next of kin by virtue of the statute of deseent and distribution,[27] but this is an open question in nearly all the States having such statutes. And it will probably require the decision of each State court to settle the question in each State under its peculiar statutes.

D. B. VAN SYCKEL.

Kansas City, Kas.

[24] Statutes of Kansas (1889), §§ 4518, 4519.

[25] Steel, Adm'r, v. Kurtz *et al.*, 28 Ohio St. 191; Drake v. Gilmore *et al.*, 52 N. Y. 389.

[26] Green v. Hudson River R. Co., 32 Barb. (N. Y.) 25. Compare Merchants' Ins. Co. v. Hinman, 34 Barb. (N. Y.) 410; 2 Abb. Pr. 277.

[27] Consult Steel, Adm'r, v. Kurtz, 28 Ohio St. 191; and compare Drake v. Gilmore *et al.*, 52 N. Y. 389; Texas & N. O. R. Co. v. Berry, 5 S. W. Rep. 817; Henderson's Adm'r v. Ky. C. R. Co., 5 S. W. Rep. 875; Wooden v. W. N. Y. & P. Ry. Co., 12 N. Y. S. (N. Y.) 908, 26 N. E. Rep. 1050. These are referred to simply as examples.

DEEDS—REGISTRATION.

DAVIS V. WHITAKER.

Supreme Court of North Carolina, May 21, 1894.

Filing a deed for registration is in itself constructive notice, and the failure of the register to index a registered deed as directed by Code, § 3664, does not impair its efficacy.

SHEPHERD, C. J.: The only question presented for our consideration is whether the deed to Spier Whitaker, trustee, was properly registered, so as to give it priority over the deed executed to Dobie & Co. on the 28th of January, 1890. The deed to Whitaker was duly admitted to probate on the 15th of January, 1883, and ordered to be registered with the certificate of the clerk of the superior court; and on the same day, together with the fee for its registration, it was delivered by the clerk to the register of deeds, who made thereon the following indorsement: "Received and recorded January 15, 1883, in Book 69, at page 395." The deed was duly registered on that day, but the register of deeds failed to index the same either in the book in which it is registered, or in the cross index provided by section 3664 of the Code. It is laid down in Jones on Mortgages (volume 1, § 553) that: "The general policy of the recording acts is to make the filing of a deed, duly executed and acknowledged, with the proper officer, constructive notice from that time; and, although it be provided that the register shall make an index for the purpose of affording a correct and easy reference to the books of record in his office, the index is designed, not for the protection of the party recording his conveyance, but for the convenience of those searching the records; and, instead of being a part of the record, it only shows the way to the record. It is in no way necessary that a conveyance shall be indexed, as well as recorded, in order to make it a valid notice." That the filing of the deed with the register had the effect of registration has always been understood to be the law in this State, and such very clearly has been the construction put by this court on the act of 1829, which now constitutes section 3654 of the Code. McKinnon v. McLean, 2 Dev. & B. 79; Metts v. Bright, 4 Dev. & B. 173; Parker v. Scott, 64 N. C. 118. In the case last named the court said: "The deed in trust was delivered to the registration at 10 o'clock a. m. on the 20th day of December, 1866, and was actually registered on the 20th day of January, 1867, as appears from the certificate of the register. In contemplation of law, the deed in trust was duly registered from the time of its delivery to the register, and from that time was good against creditors." The case of Moore v. Ragland, 74 N. C. 343, is not in conflict with this well-established doctrine, as it appears that the mortgage was left with the register with directions "not to register the same until he should be thereafter required by the plaintiff to do so." In contemplation of law the mortgage had not been delivered to the register for registration. In some of the States such effect is not given to the filing for registration, but even in those States, with but one exception, it is held, says Judge Freeman, "that a deed properly filed and copied into the record is recorded within the meaning of the registration laws, and imparts notice to subsequent purchasers, notwithstanding the failure of the recorder to properly index it, and that the index is no part of the record." See note to Green v. Garrington, 91 Am. Dec. 109, in which many cases are cited sustaining the views of the annotator. In consideration of the decisions of this court, agreeing, as they do, with the

preponderance of authority in other jurisdictions, we do not feel justified in departing from the doctrine that the filling for registration is in itself constructive notice; and, if this be so, it must follow that the failure of the register to index a deed which has actually been registered cannot impair its efficacy. It is true that in Dewey v. Sugg, 109 N. C. 328, 13 S. E. Rep. 923, it was held to be esstential to a judgment lien that it should be properly indexed, but the decision turned upon the construction of the statute, and the indexing was considered to be an essential element to the creation of that particular kind of lien. A judgment must be actually docketed by a compliance with all the statutory requirements before it becomes a lien, whereas, as we have seen, a registration is valid upon the mere filling for registration. In the absence of more explicit legislation, we cannot hold that the statute directing the indexing of deeds, etc. (Code, § 3664) has the effect of repealing the existing law as declared by this court. Affirmed.

NOTE.—All the States have passed statutes providing for the registration of deeds affecting real estate and have declared, that such registration shall be constructive notice to the parties in interest of the existence of such deeds. In order that such registration may operate as a constructive notice, the deeds must be duly executed and acknowledged (Bishop v. Schneider, 46 Mo. 472; Shepherd v. Burkhalter, 13 Ga. 443; Piper v. Hilliard, 58 N. H. 198; Keech v. Enriquez, 28 Fla. 597; Frost v. Beekman, 1 John. Ch. 288); and they must be included in the class of deeds for whose registration the law provides. When the law does not provide for the recording of a deed, its registration is notice to no one of its existence. (Pringle v. Dunn, 37 Wis. 449; Boyd v. Schlesinger, 59 N. Y. 301.) When a deed is duly recorded according to law, it is constructive notice of its existence from that date only to those who claim through or under the grantor by whom the deed was executed. (Holmes v. Buckner, 67 Tex. 107.) In the interpretation of these statutes many questions have arisen as to the effect on the rights of the various parties in interest of the neglect of the registering officers to do their duty. After the delivery of the deed to the registering officer, all acts of registration are performed by the latter. In the absence of any express declaration in the statute has the grantee in the deed discharged his duty by delivering his deed to the proper officer for registration, and is such delivery operative in his favor as constructive notice, or must the deed be actually and legally recorded before it will have that effect? On the one hand it is urged, that the recording officer is not the agent of the grantee, and that the grantee is not responsible for his blunders, and has as much right to rely on his fidelity as a subsequent purchaser, and it would be unreasonable to require him to compare his deed with the record to see if it is properly recorded. Such laws are in derogation of the common law and must be strictly construed and they contain no requirement, that the grantee shall do more than leave his deed with the proper officer for registration. The grantee is not a guarantor of compliance by the recording officer with the law as to recording. The recording is not done for his benefit but for that of others. The courts which hold these views, decide, that when a deed, properly executed and acknowledged, is lodged with the proper officer for record, constructive notice of its contents is thereby given to those interested, regardless of any action by such recording officers. (Merrick v. Wallace, 19 Ill. 486; Judd v. Woodruff, 2 Root, 298; Weese v. Barker, 7 Colo. 178; Oats v. Walls, 28 Ark. 244; Riggs v. Boylan, 4 Biss. 445; Myers v. Buchanan, 46 Miss. 397; Deming v. Miles, 35 Neb. 739; Copelin v. Shuler, Tex. 1887, 6 S. W. Rep. 668; Franklin Co. v. State, 24 Fla. 55; Lewis v. Hinman, 56 Conn. 55; Stockwell v. McHenry, 107 Pa. St. 237; Perkins v. Strong, 22 Neb. 725. This has been qualified to this extent—that when the grantee is aware of the recording officer's dereliction, he must give notice of his title by occupation of the land, the recording of a new deed, or by proceedings in court, lest he be estopped to assert his title. (Lee v. Bermingham, 30 Kans. 312.) Sometimes the statute directly provides that the deed shall be considered as recorded when delivered to the proper officer for record. (Nichols v. Reynolds, 1 R. I. 30; Throckmorton v. Price, 28 Tex. 605; Sinclair v. Slawson, 44 Mich. 123; Swepson v. Bank, 9 Lea, 713; Mims v. Mims, 35 Ala. 23; Belbaze v. Ratto, 69 Tex. 636.) Other courts take a different view of the rights of the parties. They assert, that the obligation of giving the notice rests on the one holding the title, and if this duty is imperfectly performed, he cannot claim all the advantages and lay the fault at the door of an innocent purchaser. It was never intended to impose on a purchaser the burden of entering into a long and laborious search to ascertain whether the recorder has faithfully performed his duty, which search would involve expense and would generally be useless; it would not be sound policy in the statute. Courts which hold these views, and they are believed to preponderate in number, declare that the registration of the deed must be completed before it is constructive notice. (Frost v. Beekman, 1 John. Ch. 288; Terrell v. Andrew Co., 44 Mo. 309.) Again this statute itself sometimes requires other acts by the registering officer before a deed is considered to be recorded. When the law requires as a part of the recording, that the deed be properly indexed, a failure to make such index vitiates the registration so far as constructive notice is concerned. (Barney v. McCarty, 15 Iowa, 510; Lombard v. Culbertson, 59 Wis. 433; Speer v. Evans, 47 Pa. St. 141; Miller v. Koertge, 70 Tex. 162.) Such index will however be read with the copy of the deed as transcribed on the records, if it refers thereto, and if the two together convey the required information, or if the index contains enough to put a careful man on inquiry, which inquiry will show the adverse title, the law is satisfied. (Jones v. Berkshire, 15 Iowa, 248; Calvin v. Bowman, 10 Iowa, 529; Land Co. v. Bardon, 45 Fed. Rep. 706; Oconto Co. v. Jerrard, 46 Wis. 317; St. Croix, etc. Co. v. Ritchie, 73 Wis. 409; Bostwick v. Powers, 12 Iowa, 456; Sinclair v. Slawson, 44 Mich. 123.) The record becomes effective as constructive notice from the time the deficiencies in the index are corrected. (Lombard v. Culbertson, 59 Wis. 433.) Though the law requires an index to be made, yet unless the index is declared to be regarded as forming a part of the record, it is not essential in order to make the record of the deed constructive notice, though the registering officer may be liable to those suffering from his neglect. (Green v. Garrington, 16 Ohio St. 548; Curtis v. Lyman, 24 Vt. 338; Swan v. Vogel, 31 La. Ann. 38; Stockwell v. McHenry, 107 Pa. St. 237; Chatham v. Bradford, 50 Ga. 327; Bishop v. Schneider, 46 Mo. 472; Mut. L. Ins. Co. v. Dake, 87 N. Y. 257.) When the registration is made properly and within a reasonable time, it takes effect from the time of the delivery of the deed to the officer

for record. (Sawyer v. Adams, 8 Vt. 172.) When it is held, that the grantee in the deed is bound to see that it is duly recorded, it follows as a corollary, that a *bona fide* purchaser is chargeable with notice of the deed only as it appears on the record. (Terrell v. Andrew Co., 44 Mo. 309; Sawyer v. Adams, 8 Vt. 172; Gilchrist v. Gough, 63 Ind. 576; Pringle v. Dunn, 37 Wis. 449; Jennings v. Wood, 20 Ohio, 261; Miller v. Bradford, 12 Iowa, 14; Frost v. Beekman, 1 John. Ch. 288.) A deed though recorded does not operate in such cases as constructive notice; when it is not recorded in order as required by law (N. Y. Life Ins. Co. v. White, 17 N. Y. 469); when recorded in a book, which has been long disused (Sawyer v. Adams, 8 Vt. 172); when the name of the grantor is not indexed in aphabetical order as required by law (Hiles v. Atlee, 80 Wis. 219); and when it is recorded in the wrong book. (Parsons v. Lent, 34 N. J. Eq. 67; unless the law to keep a special book be considered directory; Swepson v. Bank, 9 Lea, 713.) After the law has been fully complied with, the rights of the parties are fixed, and it is immaterial relative thereto whether such record be altered or destroyed. (Merrick v. Wallace, 19 Ill. 486; Myers v. Buchanan, 46 Miss. 397; Deming v. Miles, 35 Neb. 739; Harrison v. McMurray, 71 Tex. 122.

S. S. MERRILL.

CORRESPONDENCE.

MANDAMUS AGAINST SPEAKER OF LEGISLATIVE ASSEMBLY.

To the Editor of the Central Law Journal:

My attention has just been called to Percy L. Edwards' article on the right of courts to direct the writ of *mandamus* against the speaker of the house, being a review of the recent Michigan case. When I called at the State library to look at the article the number containing it was at the bindery, but I saw the article reproduced in the "*Albany Law Journal.*" Of that case I can say with Aeneas "*magni pars fui,*" for the blow was directed against me as clerk of the house rather than against the speaker. The clerk and not the speaker makes the journal, so far as the mechanical work is concerned; for in reality it is the house that makes its own record. Having been connected with the Michigan legislature for nearly a quarter of a century, in both houses, being an attorney at law and having made a special study of the legislative department of the State government both from a parliamentary and constitutional stand point, I saw from the very first the lack of authority in the court and the impossibility of any enforcement of any such order as it was asked to make. I did not hesitate to assert openly (but with no disrespect to the court, the justices of which I honor and respect), that the protest, which the houses had twice declared should not be entered on the journal, would ever go on the journal through me until the house ordered it there. I should have presented my own case to the Supreme Court had not arrangements been made to employ Hon. Thomas M. Cooley to represent us. When I stated to him what I considered the fundamental principles underlying the case and my deductions therefrom he said I was right. With all due deference to Mr. Edwards, I do not think he has developed the fundamental principles underlying the case. Many of them can be found only in the English parliamentary law. The case involves common law principles as affected by constitutional principles. The whole case cannot be understood from the report, as the merits and the fundamental questions were not touched in the decision. The court simply dismissed the application, because the right parties were not in court.

Lansing, Mich. LEWIS M. MILLER.

A PUZZLING WILL—ANSWER.

To the Editor of the Central Law Journal:

In answer to question in your JOURNAL of 3d inst., "A Puzzling Will," would respectfully submit the following: That the intention of the testatrix was certainly to give each child an equal part of the remainder of the plantation, after the portion sold to pay the indebtedness, etc. If her intention would have been to the portions under the will she would have worded it "I give and devise to my sons and daughters the farm as hereafter mentioned," but as she worded it, "to my sons and daughters hereafter mentioned," she certainly meant her children named in the will, and not the portions of the lands. Joanna Jackson is entitled to an equal portion of the land and five dollars in cash out of any money on hand.

S.

To the Editor of the Central Law Journal:

In CENTRAL LAW JOURNAL of August 3d, 1894, I notice an article headed "A Puzzling Will," in correspondence column. This correspondent asks you if you will give your opinion through the JOURNAL, and also let your readers express themselves upon the question. So here is my opinion expressed: Her daughter, Joanna Jackson, gets $5.00 to come out of the farm on which the testatrix was residing at time of demise, the remainder to be divided equally between one daughter and six sons and their heirs forever. Next, she gives one bed to her husband, and the residue of my bed and dishes to be equally divided between my sons and daughters. Now, you will notice Joanna shares equal in the bed and dishes with the other children. So $5.00, to come out of the farm, and an equal share in the bed and dishes is the share that belongs to Joanna Jackson, under the will. N. B. (I give and devise) and the words (as hereinafter mentioned), governs the gift and devise.

T. TAYLOR.

HUMORS OF THE LAW.

Courts of law are now and then enlivened by the unintentional comicalities which will occasionally crop up even in most serious cases. In a certain lunacy case, tried in the Court of Queen's Bench, the last witness called by Mr. Montague Chambers, leading counsel for the plaintiff, was a doctor, who, at the close of his evidence, described a case of delirium tremens treated by him, in which the patient recovered in a single night.

"It was," said the witness, "a case of gradual drinking—sipping all day, from morning till night."

These words were scarcely uttered when Mr. Chambers, who had examined the witness, turning to the Bench, and unconsciously accenting the last word but one, said:

"My Lord, that is my case."

Roars of irrepressible laughter convulsed the court.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTION BY STATE—Recovery of Bonds.—It is the duty of courts to abstain from deciding questions affecting the liability of the State on disputed claims which she has not consented to submit to judicial arbitrament, unless such decision is essential to the disposition of issues validly submitted.—STATE v. GAINES, La., 15 South. Rep. 174.

2. ADMINISTRATORS.—Where there are no unpaid claims against an estate, and the administrator has sufficient funds to pay the cash legacies, he will not be allowed to sue a distributee to foreclose a mortgage, when it has been agreed that he should take his mortgage notes as part of his distributive share, and he is willing to do so, and the only reason for bringing the action is to coerce the distributee to agree to a greater allowance to the administrator and his attorney than the court had allowed.—RAUH v. WEIS, Ind., 37 N. E. Rep. 331.

3. APPEAL — Record.—Where appellee's additional abstract asserts that both abstracts do not contain a complete and sufficient abstract of the evidence, and this assertion is not denied by appellant, the Supreme Court will not permit a bill of exceptions, obtained by appellant, to be made a part of the record, to determine the truth of appellee's assertion, but will accept it as correct.—HOFFMAN v. TRITZ, Iowa, 59 N. W. Rep. 50.

4. ASSIGNMENT OF CHOSE IN ACTION.—One who has advanced money for the prosecution of a claim under an agreement whereby suit is brought therefor to his use has an assignable interest in the claim.—SAVAGE v. GREGG, Ill., 37 N. E. Rep. 312.

5. ATTACHMENT — Against Partner—Non-residence.—Code 1892, § 127, making any ground for attachment against any partner of a firm, except non-residence, ground for attachment against all, does not forbid an attachment against one partner, on a partnership debt, on the ground of his non-residence, the other partners being residents, under *Id.* § 2353, which permits several actions on partnership contracts and liabilities.—COHEN v. GAMBLE, Miss., 15 South. Rep. 236.

6. ATTACHMENT — Pleadings.—Attachment, though sometimes called an ancillary or auxiliary proceeding, is nevertheless, in all essential respects, a suit. The affidavit of a plaintiff, made to obtain the writ of attachment, and the affidavit of a defendant, when made, denying the truth of the averments of the plaintiff, constitute the pleadings in the proceeding.—JORDAN v. DEWEY, Neb., 59 N. W. Rep. 88.

7. ATTACHMENT — Redelivery Bond.—A redelivery bond executed for the purpose of procuring the release of attached property is not a binding obligation upon the persons signing as sureties until the same has been accepted and approved by the officer who levied the writ. Such approval need not be indorsed upon the bond, but an approval may be implied from circumstances.—CORTELYON v. MABEN, Neb., 59 N. W. Rep. 94.

8. ATTORNEYS — Diversion of Fund by Client.—The fact that one member of a firm of attorneys employed to manage a will contest conspired with one of the heirs to cheat the others out of their share of a settlement, after the money had been paid over to the attorney in fact of the contesting heirs, does not render the firm liable for a diversion of the funds, where it acted in good faith until the settlement was made and money paid over.—RICHARDSON v. RICHARDSON, Mich., 59 N. W. Rep. 178.

9. BANKS—Savings Banks.—A savings bank's treasurer, having power to collect its debts, can, under orders of the board of investment, execute the power of sale of a mortgage to the bank, by conveying to the purchaser; and the bank's acceptance of the purchaser's deed of release ratifies its treasurer's act.—NORTH BROOKFIELD SAV. BANK v. FLANDERS, Mass., 37 N. E. Rep. 307.

10. CARRIERS OF PASSENGERS—Carriers.—Employees on a street car have a right to assume that a passenger, in alighting from the car in broad daylight, will notice an excavation in the street, caused by the removal of paving blocks; and the company is not chargeable with negligence because they stopped the car near the excavation, or because they failed to caution the passenger as to the condition of the street.—BIGELOW v. WEST END ST. RY. CO., Mass., 37 N. E. Rep. 367.

11. CARRIERS OF PASSENGERS—Failure to Stop at Station.—It is a "just and legal excuse" for not stopping at a station to let off three passengers,—laborers who had been drinking,—that it was after dark, the snow was deep and drifting, that, as the engineer and conductor knew, a freight train was close behind, and the only place near the station where they could stop without danger of being stalled by the snow was on a bridge and elevated track.—REED v. DULUTH, S. S. & A. RY. CO., Mich., 59 N. W. Rep. 144.

12. CARRIERS OF PASSENGERS — Contributory Negligence.—A special verdict, finding that plaintiff took his seat as a passenger in defendant's passenger car, paid the conductor the regular fare, and remained sitting in his seat all the time until the train was thrown from the track, warrants a conclusion that he was free from contributory negligence. — LOUISVILLE, N. A. & C. RY. CO. v. MILLER, Ind., 37 N. E. Rep. 343.

13. CONFLICT OF LAWS—Assumption of Risk by Servant.—The damages recoverable from an employer for the death of his employee, caused by his negligence, are controlled by the law of the place where the contract of employment was made and the accident occurred, although the death took place and action is brought in another State. — NORTHERN PAC. R. CO. v. BABCOCK, U. S. S. C., 14 S. C. Rep. 978.

14. CONSTITUTIONAL LAW—Statute—Amending Corporate Charter.—An act extending the life of a corporation created by special act before the constitutional amendment of 1871 is not the granting of corporate powers and privileges within the meaning of such amendment, which prohibits the enactment of special or private laws for that purpose.—BLACK RIVER IMP. CO. v. HOLWAY, Wis., 59 N. W. Rep. 126.

15. CONSTITUTIONAL LAW—Class Legislation. — Laws approved May 10, 1883, § 21, which provides that the directors of a booming corporation organized thereunder shall fix a price for services sufficient to cover all current expenses, and pay a dividend of not less than 12 per cent., and the balance over that, if any, shall be returned to its patrons, *pro rata*, and if the price fixed for any year is so low that no dividend can be paid, or the dividend paid is less than 12 per cent., the company can the next or subsequent years fix a price high enough to cover such deficiency, amending Laws 1864. —STIMSON V. MUSKEGON BOOMING CO., Mich., 59 N. W. Rep. 142.

16. CONSTITUTIONAL LAW—Telegraph Poles in Highway.—On trial for assault and battery on a person placing telegraph poles in the highway in front of defendant's farm, it is no defense that the articles of association of the company by whom the assaulted person was employed were not filed with the secretary of the State at the time.—PEOPLE V. EATON, Mich., 59 N. W. Rep. 145.

17. CONTEMPT — Evidence. — One L required of the deputy sheriff whether he had a subpœna for one B as a witness, and was told that he had not. Early the next morning L gave B money, and B immediately left the State. B's testimony was material: Held, a sufficient basis on which to issue a writ requiring L to show cause why he should not be punished for contempt of court.—MONTGOMERY V. PALMER, Mich., 59 N. W. Rep. 148.

18. CONTEMPT OF COURT—Erroneous Order.—It is no excuse for contempt of an order of courtthat the order is founded on error of law or fact. The error must be questioned by direct proceedings to review the order, not by disobedience.—FORREST V. PRICE, N. J., 29 Atl. Rep. 215.

19. CONTRACT—Action for Services—Repair of Broken Levee.—In cases of flood, as in those of conflagration, services rendered voluntarily to preserve another man's property from destruction are presumed to be gratuitous, and give no cause of action.—NEW ORLEANS, FT. J. & G. I. R. CO. V. TURCAN, La., 15 South. Rep. 187.

20. CONTRACT — Illegal Combination — Dismissal by Court.—Courts will not adjust a controversy arising out of the illegal purpose and attempt of a draymen's association to deprive the presses of this city of the right to choose the labor required for hauling cotton; the association proposing to accomplish that purpose by passing a tariff of charges for hauling, designating their members to do the hauling, and subscribing money to prevent the presses from obtaining any labor except that furnished by the association, to be paid according to their tariff, and the testimony showing that the purpose was made effective by money put up by the association and other methods, by which non-union men were compelled to abandon the services of the presses.—FABACHER V. BRYANT, La., 15 South. Rep. 181.

21. CONVERSION—Action by Heirs.—Where executors, directed by will to apply the income of the estate to the use of testator's widow during her life, convert most of it to their own use, investing it in land in their own name, the widow's heirs cannot, as such, on her death, maintain an action against the executors for an accounting and recovery of the money, but it must be by her personal representative, in course of administration of her estate.—COHEN V. MOSS, N. J., 29 Atl. Rep. 194.

22. CORPORATION—Appointment of Receiver.—Where funds of a corporation were attached by plaintiffs, and subsequently a bill for a receiver was filed, and a receiver appointed, and the funds were paid over to the receiver, by order of court, without prejudice to the rights of attaching parties, the claims of plaintiffs, if allowable to be proved, should be preferred, to the extent of the property attached.—PAGE V. SUPREME LODGE, KNIGHTS AND LADIES OF PROTECTION, Mass., 37 N. E. Rep. 369.

23. COUNTIES—Post-mortem Examination.—Where a physician makes a post-mortem examination by the direction of the coroner, it is the duty of the board of supervisors to allow a reasonable compensation therefor (section 368, ch. 64, Acts 20th Gen. Assem.) and, if the allowance made by the board is not reasonable, the physician is not bound to accept it, but may maintain an action therefor against the county.—MOSER V. BOONE COUNTY, Iowa, 59 N. W. Rep. 39.

24. COURT-MARTIAL—Writ of Prohibition.—Where accused is charged before a court-martial with "conduct prejudicial to good order and military discipline," and the specification shows that he is alleged to have committed a homicide, a plea of former acquittal by a civil court is a defense going to the merits of the case, and not to the jurisdiction of the court, and a civil court cannot interfere to prevent the exercise of such jurisdiction.—UNITED STATES V. MANEY, U. S. C. C. (Minn.), 61 Fed. Rep. 140.

25. CRIMINAL EVIDENCE.—It is a rule, subject to special exceptions, that when a person is on trial for one offense evidence of another and extraneous crime is inadmissible. Such evidence is dangerous, and calculated to lead to convictions, upon a particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses in order to produce conviction for a single one.—STATE V. BATES, La., 15 South. Rep. 204.

26. CRIMINAL EVIDENCE — Homicide — Res Gestæ.—Declarations by deceased to the police surgeon who dressed his wounds, after he had been carried across the street from where he was wounded, and while his wounds were being dressed, as to who stabbed him, are admissible as part of the *res gestæ*.—COMMONWEALTH V. WERNTZ, Penn., 29 Atl. Rep. 272.

27. CRIMINAL LAW—Grand Jury.—A wide discretion is allowed to the presiding judge in directing the attention of the grand jury to particular subjects of inquiry, or to particular offenses or classes of offenses, and that discretion appellate courts will not assume to control. —CLAIR V. STATE, Neb., 59 N. W. Rep. 118.

28. CRIMINAL LAW — Larceny — Former Acquittal.—Where persons steal two animals, taking one from each of two different herds having different owners, and taking one about an hour after the other, and driving both off together, there are two acts and two offenses, and an acquittal as to one is not an acquittal as to the other.—STATE V. ENGLISH, Mont., 36 Pac. Rep. 815.

29. CRIMINAL PRACTICE—Larceny—Variance.—Where an indictment charges defendant with stealing a watch, the property of Preston O. Sweet, and the evidence shows that the owner's name was O. Preston Sweet, but that he was as well known by one name as the other, there is no variance.—COMMONWEALTH V. WILLIAMS, Mass., 37 N. E. Rep. 371.

30. CRIMINAL LAW — Recognizance on Appeal.—A recognizance for an appeal in a criminal case is not required to be signed by the defendant and his sureties, but, if so signed, it is not, for that reason alone, invalid. If otherwise properly taken and certified, the signatures of the recognizors may be disregarded as surplusage.—SHUPE V. STATE, Neb., 59 N. W. Rep. 100.

31. CRIMINAL PRACTICE — Larceny—Indictment.—In an indictment or information for larceny, the property alleged to have been stolen should be described with sufficient particularity to enable the court to determine that such property is the subject of larceny, to advise the accused with reasonable certainty of the property meant, and enable him to make the needful preparations to meet such charge at the trial.—BARNES V. STATE, Neb., 59 N. W. Rep. 125.

32. DECEIT—Appeal.—In an action for false representations as to the sanitary condition of a house leased by plaintiff from defendant, where damages are claimed because of diptheria contracted by one of plaintiff's children, and there is evidence that the child was absent from the house a part of each day, attending school in another part of the city, the jury

cannot act on conjecture, but the fact that the poor sanitary condition of the house was the cause of the sickness must be proved.—LITTLEHALE v. OSGOOD, Mass., 37 N. E. Rep. 375.

33. DEDICATION OF STREETS. — Where the owner of a tract of land makes a town plat of it, with spaces for roads or streets laid out thereon, and conveys lots with reference to, and bounded by, such roads or streets he hereby dedicate the said road or street to public use, as such; and the grantees in the conveyances acquire the right to have said roads or streets kept open for the benefit of light and air, as well as passageways.—WINTER v. PAYNE, Fla., 29 Atl. Rep. 211.

34. DEED—Construction—Riparian Rights.—Where a deed conveys land bordering on a lake by a description, the calls for the eastern boundary of which are: "Thence east to the shore of the lake; thence north, along said lake shore, to a certain point; and thence west," etc.: Held, it conveys all the riparian rights of the grantor in the lake, in front of the land conveyed, and, as against the grantor, any land made by filling in the lake at the shore.—CASTLE v. ELDER, Minn., 59 N. W. Rep. 197.

35. DEED—Delivery — Recording. — The leaving of a deed by the grantor with the register for record, though with the unexpressed intention to pass the title to the grantee, and the recording of the deed by the register, do not constitute a delivery. — BARNES v. BARNES, Mass., 37 N. E. Rep. 379.

36. DEED—Estates Created.—By a deed to the grantor's daughter "and her children," the daughter takes only a life estate, with remainder in fee to her children as a class, so that those in being at the date of the deed, as well as those subsequently born, are entitled to take on the termination of the life estate, at her death.—HAGUE v. HAGUE, Penn., 29 Atl. Rep. 261.

37. DEEDS—Execution Outside of State—Acknowledgment.—Code, § 1966, making valid conveyances of land in the State of Iowa, previously executed, and which have been acknowledged according to the laws and usages of the State in which such conveyances were acknowledged, does not validate a deed of Iowa land executed in Minnesota, though the acknowledgment complied with the laws of Minnesota, where the certificate of acknowledgment was not in accordance with the usages of such State. — KRUGER v. WALKER, Iowa, 59 N. W. Rep. 65.

38. DEED — Failure to Record. — February 1, 1890, L executed to appellee a deed of land as security for a debt, which was not recorded until November 21, 1891. September 8, 1891, C, without knowledge of said deed, loaned L money, taking no security. November 24, 1891, L made an assignment for the benefit of creditors: Held, that the withholding of the deed from record, without proof of fraud, would not make C a preferred creditor.—IN RE LEMERT, Iowa, 59 N. W. Rep. 207.

39. DEED—Material Alteration.—Where a deed recites that it is "for the consideration of——dollars"' it is not a material alteration to insert the number of dollars, so as to express the actual consideration paid.—MURRAY v. KLINZING, Conn., 29 Atl. Rep. 244.

40. DEED—Mistake of Fact.—A deed made for a full consideration by an old woman who was competent to transact business will not be set aside because she was induced to make it by the false but honest representation of her son, through whom the sale was made, that notes taken for the price would not be subject to taxation, where the son was not authorized by the grantee, his son-in-law, to make such representation. — WOOD v. STEDWELL, Iowa, 59 N. W. Rep. 28.

41. DEED OF TRUST — Power of Sale. — Where a trust deed provides for the application of the proceeds of sale to the discharge of the debt secured, and to the payment of "expenses" of the trust, including "five per cent. commissions" to the trustee, the latter, after default of the grantor, and advertisement of the property for sale, is entitled to such commissions, and to reasonable counsel fees necessarily paid by him in executing the trust, though a junior lienholder pays in the amount of the debt secured, and the sale is not in fact made.—CANNON v. MCCAPE, N. Car., 19 S. E. Rep. 703.

42. EMINENT DOMAIN — Condemnation Proceedings—Notice. — In condemnation proceedings by a railroad company, a published notice of assessment of damages directed to a person named, "and all other persons having any interest in or owning any" of the land, does not charge an owner not named with notice of the proceedings, but, if he appeals to the district court from the assessment, the objection is waived. — ELLSWORTH v. CHICAGO & I. W. RY. Co., Iowa, 59 N. W. Rep. 78.

43. EQUITY—Vendor's Lien—Payments. — Where part of the consideration for a deed is the vendee's assumption of certain debts of a vendor, amounting to a sum certain, and the vendee settles such debts by compromise for less than their face, he is liable to the vendor for the rebate on such debts since he acts in the matter as the vendor's agent. — KOCH v. ROTH, Ill., 37 N. E. Rep. 317.

44. EVIDENCE—Opinion.—A question calling for witness' opinion whether testator "was of sound mind as he had been in prior years," without fixing any particular time to which it should apply, is properly excluded.—DENNING v. BUTCHER, Iowa, 59 N. W. Rep. 69.

45. EXECUTION — Exemption.—Where personal property is seized under an execution against a debtor who has neither lands, town lots, nor houses subject to exemption, and an inventory, under oath, is made and filed by such debtor, as provided by section 522 of the Code, it is the duty of the officer holding the writ to call appraisers to determine the value of the property, and the neglect or refusal of the officer to do so will not deprive the debtor of his exemptions, but he may sue for the value of the property.—BENDER v. BAME, Neb., 59 N. W. Rep. 105.

46. EXECUTORS — Accounting.—An executor, who takes no part in the administration of an estate, and who by the will is not to, unless the testator's widow (the executrix) remarries, is not liable for a misappropriation of its funds by her.—MACDONALD v. HANNA, Mich., 59 N. W. Rep. 171.

47. FEDERAL COURTS—A bill in a State Court by a railroad company, to which land had been granted by congress, to restrain a sale for taxes of lands within the grant, asserting that they had not been identified as passing by the grant, so as to extinguish all interest of the United States, was dismissed on the ground that a statutory remedy by application to a board of correction and equalization had not been exhausted: Held that, as it was for the State court to determine the effect of the statute, and the company in no sense represented the United States, no federal question was presented.—NORTHERN PAC. R. CO. v. PATTERSON, U. S. S. C., 14 S. C. Rep. 977.

48. FEDERAL COURTS—Suit on Penal Bond.— When one sues for the full amount of a penal bond which exceeds $2,000, but at the trial his own evidence shows that he actually claims less than $2,000, the case must be dismissed.—CABOT v. MCMASTER, U. S. C. C. (Ill.), 61 Fed. Rep. 129.

49. FRAUDS, STATUTE OF— Parol Agreement to Devise Property.—A parol agreement to devise both real and personal property as compensation for services rendered by a nephew is within the statute of frauds. —IN RE KESSLER'S ESTATE, Wis., 59 N. W. Rep. 129.

50. FRAUDULENT CONVEYANCES — Change of Possession.—Where the validity of a chattel mortgage, and subsequent transfer to the mortgagor's brother, is disputed, as being in fraud of creditors, admissions of the mortgagor, made 14 days after the execution of the mortgage, and 5 days after the transfer, while still in the actual possession of the property, that he was still afraid his creditors were going to close him up, and had made the mortgage to protect his brother, to

whom he owed "a trifle," and another creditor, are admissible.—BENJAMIN MCELWAINE-RICHARDS, CO., Ind., 37 N. E. Rep. 362.

51. FRAUDULENT CONVEYANCES—Rights of Creditors after Assignment.—Where the assignee refuses to sue to set aside a fraudulent mortgage, a general creditor may do so, under 2 How. St. § 8744, and 3 How. St. § 8749, authorizing the Circuit Court, on application of any one interested in the assigned estate, to make all orders necessary to prevent fraudulent transfers.—BURNHAM V. DILLON, Mich., 59 N. W. Rep. 176.

52. GARNISHMENT—Procedure.—In garnishment proceedings for money alleged to be due defendant from garnishee under a contract whereby defendant sold garnishee lumber, where the garnishee has had allowed to him all the damages claimed by his answer because of defendant's failure to complete the contract, and where the evidence as to damages other than those claimed in the answer is uncertain and indefinite, such damages should be disallowed.—GLOBE MILLING CO. V. HANSEN, Wis., 59 N. W. Rep. 132.

53. GIFT.—Decedent's father, on being offered money which she owed him, said, "Keep it for the children." On her second marriage, the father showed some anxiety about the money, and decedent made a will, leaving it to the children. She invested the money separately, expressing her purpose not to touch it, "as it was for the children's education:" Held, that the gift was intended by the father to be for the children, and so accepted by decedent.—IN RE OSMOND'S ESTATE, Penn., 29 Atl. Rep. 266.

54. HABEAS CORPUS—Appeal—Custody of Prisoner.—Pending an appeal from a refusal to grant the writ in behalf of a person confined under sentence of a State court, the custody of the prisoner cannot be disturbed and the fact that he is daily required to perform hard labor pending the appeal gives no authority, under Rev. St. § 766, for any interference on a subsequent application for the writ.—IN RE MCKANE, U. S. C. C. (N. Y.), 61 Fed. Rep. 205.

55. HABEAS CORPUS—When Lies.—*Habeas corpus* will not lie to determine the simple question of law whether the facts proved before a United States commissioner on preliminary hearing are sufficient to constitute the crime for which the prisoner has been committed.—EX PARTE RICKELT, U. S. C. C. (Ohio), 61 Fed. Rep. 203.

56. HIGHWAYS—Change of Grade—Arbitrating Damages.—Selectmen being empowered by Gen. St. § 64, to "superintend the concerns of the town, adjust and settle all claims against it, and draw orders on the treasurer for their payment," neither exceed nor delegate their powers in submitting to arbitration a lawful claim against the town for damages for changing a highway grade.—MALLORY V. TOWN OF HUNTINGTON, Conn., 29 Atl. Rep. 245.

57. HIGHWAYS—Vacation—Damages.—On proceedings to vacate a highway, the opinions of witnesses as to the market value of a remonstrant's land, abutting thereon, without the road, and its market value with it, are admissible.—BRANDENBURG V. HITTEL, Ind., 37 N. E. Rep. 329.

58. HOMESTEAD — Survivor's Exemption.—Code, § 2007, provides that, on the death of the husband or wife, the survivor may occupy the whole homestead until this is otherwise legally disposed of Code, § 2008, provides that the setting off of dower is to be deemed a disposal of the homestead, but the survivor may elect to retain the homestead for life in lieu of dower: Held, that a surviving husband who does not occupy, nor intend to occupy his deceased wife's homestead, cannot hold his undivided distributive share therein exempt from process for his debts.—HORNBECK V. BROWN, Iowa, 59 N. W. Rep. 82.

59. HUSBAND AND WIFE—Wife's Separate Support.—In a wife's action for separate support without divorce, she may be allowed support pending suit on a showing that she is without means, that her husband is able to furnish them, and that she is entitled to suit money.—SIMPSON V. SIMPSON, Iowa, 59 N. W. Rep. 22.

60. INJUNCTION—Obstruction of Culvert.—The owner of land abutting upon a highway will be restrained by injunction prayed for by the inhabitants of the township from obstructing a culvert, placed in the highway at a point where falling rains and melting snows would collect and flow to and upon the defendant's land, if no highway were there, and which, without such culvert, causes the highway to become miry, founderous, and out of repair. — INHABITANTS OF TOWNSHIP OF HAMILTON V. WAINWRIGHT, N. J., 29 Atl. Rep. 200.

61. INJUNCTION—Overflowing Lands.—Injunction will not lie to prevent the laying out of a drain for the drainage of a street on which plaintiff's property abuts, where it does not appear that it will cause a greater volume of water to pass over plaintiff's land than before its erection, or that it will cast water on the land with greater force than the water would be cast in the absence of it.—COLLINS V. CITY OF KEOKUK, Iowa, 59 N. W. Rep. 200.

62. INSURANCE—Condition against Vacancy.—A policy of insurance on a house and barn, conditioned to be void if the premises insured became vacant, becomes void only on the vacancy of both.—WORLEY V. STATE INS. CO. OF DES MOINES, Iowa, 59 N. W. Rep. 16

63. INSURANCE—Live Stock—Authority of President.—Where the business of a live stock insurance company is to insure against loss by the death of live stock, the authority of the president to impose a liability on the company for stock intentionally destroyed will not be presumed, but must be shown by the policy holder seeking to enforce such liability.—TRIPP V. NORTHWESTERN LIVE STOCK INS. CO., Iowa, 59 N. W. Rep. 1.

64. INTERSTATE COMMERCE LAW—Connecting Lines.—The provision of the interstate commerce law forbidding discrimination against any locality or description of traffic (24 Stat. 380, § 3, cl. 1), is for the protection of the locality or traffic itself, and cannot be invoked by a carrier as against a connecting carrier which discriminates, in the matter of requiring prepayment of freight and car mileage, between goods which come from different sections of the country over the line of the complaining carrier.—OREGON SHORT LINE & U. N. RY. CO. V. NORTHERN PAC. R. CO., U. S. C. C. of App., 61 Fed. Rep. 158.

65. JUDGMENT—Audita Querela.—A judgment debtor, who has been compelled to pay the judgment by the assignee thereof, cannot maintain *audita querela*, to recover the amount so paid, against the judgment creditor, who had nothing to do with the enforcement of the judgment, and who received nothing thereunder.—RADCLYFFE V. BARTON, Mass., 37 N. E. Rep. 373.

66. JUDGMENT—Mortgage.—A judgment for a deficiency may be rendered against one who purchased the mortgaged property after the mortgage was made, and, in his purchase, assumed and agreed to pay the mortgage debt.—GRAND ISLAND SAV. & LOAN ASS'N V. MOORE, Neb., 58 N. W. Rep. 115.

67. LANDLORD AND TENANT.—Where the landlord agreed to make improvements for the benefit of the tenant, held, his failure to make them does not relieve the tenant in possession from liability to pay rent: Held, further, in such case the tenant is entitled to damages, the measure of which is the difference between the rental value of the premises without the improvements and their rental value with the improvements.—LONG V. GIERIET, Minn., 59 N. W. Rep. 194.

68. LANDLORD AND TENANT—Covenant—Eviction.—A lease of the cigar and news room in a hotel, with the appurtenances thereto, and the right of entrance to and from the hotel rooms, and the entire cigar privilege of such hotel, constitutes an express covenant for quiet enjoyment of the premises leased.—COULTER V. NORTON, Mich., 59 N. W. Rep. 163.

69. LANDLORD AND TENANT—Lease—Termination.—A

reservation, in a lease, of the right to sell the demised premises, and to terminate the lease as to the premises sold, cannot be held void as repugnant to the demise. —SHAW v. APPELTON, Mass., 37 N. E. Rep. 372.

70. LANDLORD AND TENANT—Tenancy from Year to Year.—The rule that an annual reservation of rent is necessary to turn a lease for an uncertain term into a lease from year to year does not apply to a parol tenancy for years, void under the statute of frauds, where the entire rent has been paid in advance, and such a tenancy is from year to year.—BRANT v. VINCENT, Mich., 59 N. W. Rep. 169.

71. MALICIOUS PROSECUTION—Evidence—Damages.—In an action for malicious prosecution on a charge of embezzlement, plaintiff may show the nature of his business, the difficulty he had in obtaining employment, the impairment of his credit, the decrease in his earnings, the injury to his feelings and reputation, and the indignity which he suffered.—WHEELER v. HANSON, Mass., 37 N. E. Rep. 882.

72. MALICIOUS PROSECUTION — Justification—Principal.—A railroad company is not liable for malicious prosecution on a charge of stealing a wheelbarrow owned by it, instituted by a watchman in its employ, unless he was instructed to make the complaint by one of the officers or agents of the company having authority in the matter, or he acted in the line of his duty in so doing.—GOVASKI v. DOWNEY, Mich., 59 N. W. Rep. 167.

73. MANDAMUS—Return to Writ.—A return to an alternative writ of *mandamus* should state the facts relied on in confession and avoidance with such precision and certainty that the court may be fully advised of all the particulars necessary to enable it to pass judgment upon the sufficiency of the return.—STATE v. BLOXHAM, Fla., 29 Atl. Rep. 227.

74. MANDAMUS TO STATE BOARD OF CANVASSERS.—The court can compel, by *mandamus*, the reconvening of a board of State canvassers, and a recanvass of the vote on a constitutional amendment, as provided by 1 How. St. §§ 213, 214.—RICH v. BOARD OF STATE CANVASSERS, Mich., 59 N. W. Rep. 181.

75. MASTER AND SERVANT—Assumption of Risk—Defective Machinery.—Where the dangerous condition of an instrumentality furnished a servant to do his work is known to both the master and servant, and the latter, upon his objecting to continue its use, is induced to do so for a short time by the request of the master, for his own convenience and purposes, and his promise that at the end of such time the use shall be discontinued, the servant does not during such time assume the risk incident to such dangerous condition, unless it be so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it.—SCHLITZ v. PABST BREWING CO., Minn., 59 N. W. Rep. 188.

76. MASTER AND SERVANT—Dangerous Premises.—A railroad company is not bound to give notice to its experienced engineers of the erection of a post four feet outside the line of passage of a train.—THAIN v. OLD COLONY R. CO., Mass., 37 N. E. Rep. 309.

77. MASTER AND SERVANT—Fellow-servants.—A common laborer employed by the company owning and operating a railroad, and working, under direction of a section foreman, on a culvert thereon, is a fellow-servant with the engineer and conductor of a passenger train on the road, in such sense as exempts the company from liability for an injury to him through negligence of such conductor and engineer in operating the train.—NORTHERN PACIFIC R. CO. v. HAMBLY, U. S. S. C., 14 S. C. Rep. 983.

78. MASTER AND SERVANT — Negligence.—A rule of a railroad company warning employees against taking risks in entering between moving cars to uncouple them, and notifying them that the company will not be liable for injuries received while taking such risks, is competent in an action for the killing of an employee who knew such rule, while uncoupling moving cars.—FORD v. CHICAGO, R. I. & P. RY. CO., Iowa, 59 N. W. Rep. 5.

79. MASTER AND SERVANT — Negligence — Dangerous Appliances.—A smelting company is liable to an employee injured by the parting of a rubber hose containing hot acids through the negligence of its foreman in splicing two pieces of old hose to make it, though such foreman was the fellow-servant of the employee in so far as he served in the places or with the machinery or appliances furnished by the company; since, it being the foreman's duty to select and prepare the appliances to be used by the employees for conducting such acids, he represented the company in this respect. — NIXON v. SELBY SMELTING & LEAD CO., Cal., 36 Pac. Rep. 803.

80. MASTER AND SERVANT — Negligence—Dangerous Premises.—An employee assumes the risk of falling into a well on his employer's premises, which is obvious and known to the employee, who continues in the employment without objection.—FEELEY v. PEARSON CORDAGE CO., Mass., 37 N. E. Rep. 368.

81. MECHANIC'S LIENS—Architect's Plans.—The preparation by architects of plans and specifications for a building that is not erected, or an improvement that is not made, is not performing labor on the building or improvement, within Acts 16th Gen. Assem. ch. 100, § 3, which gives a lien to persons doing any labor on any building, erection, or other improvement upon land.—FOSTER v. TIERNEY, Iowa, 59 N. W. Rep. 56.

82. MECHANIC'S LIEN — Mortgage.—The failure of an account and its accompanying statement, filed to secure a mechanic's lien, to disclose affirmatively that such filing is within the requisite time to entitle to the lien claimed, operates to defeat the relation back of such lien as against liens in existence before the filing of such account.—CHAPPELL v. SMITH, Neb., 59 N. W. Rep. 110.

83. MORTGAGE—Growing Crops.—A matured crop of corn standing ungathered upon land sold at judicial sale, which was not considered or taken into account by the appraisers in arriving at the value of the premises sold, did not pass to the purchaser at the judicial sale, but remained the property of the mortgagor, who had planted and cultivated it.—FOSS v. MARR, Neb., 59 N. W. Rep. 122.

84. MORTGAGES — Payment of Taxes—Redemption.—One who has bought in land under a deed of trust, being entitled to the income, is bound to pay the taxes; and if he allows these to become delinquent, and by his consent his intended devisee buys in the land at the tax sale, her tax title is not good, against an unexpired right of redemption from the trust deed.—SEVIER v. MINNIS, Miss., 15 South. Rep. 234.

85. MUNICIPAL CORPORATION—Board of Prisoners.—Where a city recorder had the jurisdiction of a justice of the peace of offenses against State laws and against city ordinances under the charter, which further provided that he might imprison persons adjudged guilty of the violation of city ordinances or State laws in the city prison or county jail, the city is liable for the board of persons committed to the county jail for violations of city ordinances, since the charter intends that prisoners shall be imprisoned in the city prison for violation of ordinances and in the county jail for violation of State laws.—SONOMA COUNTY v. CITY OF SANTA ROSA, Cal., 36 Pac. Rep. 810.

86. MUNICIPAL CORPORATIONS — Liability for Negligence.—A city is not liable to one employed by it as a lineman on its fire-signal system, who is injured by the breaking of a pole to which the wires of the system were attached, though the breaking was due to the negligence of the city.—PETTINGELL v. CITY OF CHELSEA, Mass., 37 N. E. Rep. 380.

87. NEGLIGENCE—Roads.—In an action for personal injuries caused by being run over by a wagon driven by defendant, it is proper to refuse to instruct that the fact that defendant was driving on the left of the traveled part of the road was of itself evidence of, or

tended to prove, negligence.—MESERVEY v. LOCKETT, Mass., 37 N. E. Rep. 31[illegible].

88. NEGOTIABLE INSTRUMENTS—Bona Fide Holder.—A note extorted by a threat of the payee that he would use his influence with the city council to prevent the maker from being paid for paving one of the city streets is void in the hands of the original payee, and the burden of proof is on an indorsee to show that he is a *bona fide* holder, without notice.—FRENCH v. TALBOT PAVING CO., Mich., 59 N. W. Rep. 166.

89. NEGOTIABLE INSTRUMENT — Consideration. — A note given by a husband is a sufficient consideration for one given by his wife, in renewal thereof, after she had taken possession of his estate, upon his death, without administration.—FRENCH v. FRENCH, Iowa, 59 N. W. Rep. 21.

90. NEGOTIABLE INSTRUMENT — Parol Evidence — Indorsement.— Where a party signs his name on the back of a promissory note before delivery, for the purpose of giving it credit: Held, he cannot show by parol that his agreement was that of indorser, and not of maker: Held, further, that the fact that he was indorser of a prior note, for which this note was substituted, will not change the rule.—DENNIS v. JACKSON, Minn., 59 N. W. Rep. 198.

91. NEGOTIABLE INSTRUMENT—Promissory Note—Indorsement.—Where one of the makers of a promissory note signs it on its face, and by its terms he in the singular form promises to pay the amount of the note, and before delivery the other makers sign it on the back of it, held, the note is joint and several as to all the defendants: Held, further, the holder of such a note may treat it as several.—WOLFORD v. BOWEN, Minn., 59 N. W. Rep. 195.

92. OFFICER—Liability — Injury to Convict.—Public officers, having the custody of prisoners, are not liable to a prisoner for injuries caused by defective machinery with which he was put to work.—O'HARE v. JONES, Mass., 37 N. E. Rep. 371.

93. PARTNERSHIP — Individual — Creditors. — When land held by partners as tenants in common is purchased with firm funds, though charged at the time to the partners individually, but upon the opening of a real-estate account on their books is charged back, and each partner credited with his proportion of the price, and thereafter it appears in the annual statement of assets and liabilities of the firm, such land is a firm asset.—HARNEY v. FIRST NAT. BANK OF JERSEY CITY, N. J., 29 Atl. Rep. 221.

94. PLEADING—Trusts—Statute of Frauds.—In an action to establish a trust in land, the objection that the contract is within the statute of frauds because in parol cannot be raised by demurrer, unless the bill shows that fact on its face.—BEADLE v. SEAT, Ala., 15 South. Rep. 243.

95. PRINCIPAL AND AGENT—Ratification.—When declarations of an agent are admitted, under a promise to prove such agency, and the evidence tends to prove only a ratification of his acts, and not authority to act as agent when the declarations were made, they should be stricken out on motion.—LONG v. OSBORN, Iowa, 59 N. W. Rep. 14.

96. PROCESS—Writs—Publication.—An affidavit that personal service cannot be made in the State on defendants, as they are non-residents, sufficiently shows an inability existing at the commencement of the suit, though the petition was not filed till next day.—SNELL v. MESERVY, Iowa, 59 N. W. Rep. 32.

97. PUBLIC LANDS—Railroad Grants.—The mere filing of a declaratory statement, without any previous settlement, as required by the pre-emption laws (Rev. St. § 2264 *et seq.*), was not sufficient to cause a pre-emption claim to become "attached" to the lands so as to except it out of the grant made to the Union Pacific Railway Company by the act of 1864.—UNITED STATES v. UNION PAC. RY. CO., U. S. C. C. (Kan.), 61 Fed. Rep. 143.

98. RAILROAD AID—Tax on Rival Railroad Property.—The property of a railroad company, used exclusively for railroad purposes, located in a township where a tax is legally levied to aid in the construction of a railroad of another, competing, company is subject to such tax, though it did not acquiesce in its levy, and may be injured by the competing road.—PITTSBURGH, C., C. & ST. L. RY. CO. v. HARDEN, Ind., 37 N. E. Rep. 324.

99. RAILROAD COMPANIES— Crossings — Negligence.—Where a railroad company voluntarily establishes gates at a highway crossing, leaving them open when a train is approaching is evidence of negligence.—WILSON v. NEW YORK, N. H. & H. R. CO., R. I., 29 Atl. Rep. 258.

100. RAILROAD COMPANY—Exemption from Taxation.—A clause in a railroad company's charter, that "no tax shall ever be laid on said road or its fixtures which will reduce the dividends below 8 per cent.," is not void for uncertainty because no limit of capital stock is fixed, and no means provided for fixing the same, or ascertaining the dividends thereon; the amount of stock issued being known, and there being no difficulty in ascertaining the amount of profits from net earnings in any year applicable to payment of dividends—MOBILE & O. R. CO. v. STATE OF TENNESSEE, U. S. S. C., 14 S. C. Rep. 968.

101. RAILROAD COMPANY—Injury to Person on Track.—Where a person voluntarily goes upon a railroad track where there is an unobstructed view of the track, and fails, without excuse, to look or listen, he is not entitled to recover for injuries received.—JOHNSON v. CHICAGO & N. W. RY. CO., Iowa, 59 N. W. Rep. 66.

102 RAILROAD COMPANY — Yard Used in Common—Negligence.— Where two railroad companies jointly occupy the same property, such as depot grounds, switch yards, and tracks, each company is bound to exercise ordinary care to prevent injuring the employees of the other; and if an employee of one company, while in the discharge of his duties on such grounds, and without negligence on his part, is injured by the negligence of the employees of the other company, such company is liable therefor.—OMAHA & R. V. RY. CO. v. MORGAN, Neb., 59 N. W. Rep. 81.

103. REAL ESTATE BROKERS— Commissions.—A real-estate broker is not entitled to commissions for procuring a purchaser for lands where the sale is abandoned with his own consent. —SAWYER v. BOWMAN, Iowa, 59 N. W. Rep. 27.

104. REMOVAL OF CAUSES—Delay.—The court has no power to permit a removal after the time prescribed (25 Stat. 435, § 3), even when defendant's attorney has been prevented by a storm, which stopped the trains, from reaching the place of holding court until the morning after the last day on which the petition and bond could be filed. —DAUGHERTY v. WESTERN UNION TEL. CO., U. S. C. C. (Ind.), 61 Fed. Rep. 138.

105. REMOVAL OF CAUSES—Separable Controversy.—When a citizen of North Carolina, claiming under a parol trust in an equity of redemption, sues to enjoin the trustee's sale, and to redeem from the trust deed, the trustee and beneficiaries being citizens of Virginia, but the other defendants, who deny his right, citizens of North Carolina, since plaintiff's right to an accounting depends on his proof of the trust against the North Carolina defendants, those of Virginia have no separable cause for removal to a Federal Court.—FAISON v. HARDY, N. Car., 19 S. E. Rep. 701.

106. REPLEVIN—Demand—Diseased Animals.—3 How. St. § 2136v, imposing a penalty for selling an animal affected with a contagious or infectious disease, does not make the trade of a glandered horse so absolutely void that the defrauded person can replevy the horse he exchanged without prior demand and tender back of the boot money.—HAVEY v. PETRIE, Mich., 59 N. W. Rep. 187.

107. SALE—Replevin—Fraud.—In replevin for goods sold to defendant's vendor, R, on the ground that R bought not intending to pay, and that defendant had

notice enough to put him on inquiry, evidence that, about the time of the transfer, a bank account was opened in the name of R & Co., that no partnership was in fact formed and that defendant checked out the account, is competent. — REID, MURDOCK & CO. v. JOHNSON, Mich., 59 N. W. Rep. 141.

108. SPECIFIC PERFORMANCE—Statute of Frauds.—A contract for the sale of lands, describing them by section, township, and range, is valid under the statute of frauds, though the names of the State and county are omitted; and parol evidence is admissible to complete the description, and identify the property.—TEWKSBURY v. HOWARD, Ind., 37 N. E. Rep. 355.

109. TAXATION — Exemption — Schools. — A school building in which stenography and typewriting are exclusively taught is not exempt from taxation by article 207 of the constitution. The proviso in said article excludes from its benefits schools that are conducted for private profit. — LICHENTAG v. TAX COLLECTOR OF FIRST DIST., La., 15 South. Rep. 176.

110. TAXATION—Equalization.— Act March 6, 1891, p. 199, § 114, empowers the county board of review to equalize valuations and correct lists, fixing true cash values, and, after notice, equalizing values. Section 125 allows appeals to the State board of tax commissioners, who shall have all the powers conferred on county boards of review: Held, that the State board has not original jurisdiction to fix assessments other than its express power over railroad property.—JONES v. RUSHVILLE, NAT. BANK, Ind., 37 N. E. Rep. 338.

111. TAX DEED — Validity — Notice of Redemption. —Where the notice of redemption from tax sale must be filed with the treasurer, and there must be with it an affidavit of service, "signed and verified by the holder of the certificate of purchase, his agent or attorney" (Code, § 894), the treasurer has no authority to execute a tax deed on the filing of a notice and an affidavit of service, signed and verified by another than the holder of the certificate, which does not show that such person was the agent or attorney of such holder. STEVENS v. MURPHY, Iowa, 59 N. W. Rep. 203.

112. TAX TITLES—Limitation.— Code § 902, which limits to five years from the execution of the tax deed the time within which a tax title holder may sue for possession of the land, does not apply to wild, unoccupied prairie land, since the tax deed gives him constructive possession.—DORWEILER v. CALLANAN, Iowa, 59 N. W. Rep. 74.

113. TRESPASS— Pleading.—In trespass for occupying plaintiff's land for several years, where there is no allegation in the substituted petition or in its amendments as to damages for pasturage, and no evidence is introduced on this point, an instruction to award plaintiff the fair value of the pasture land used by defendant is error prejudicial to defendant.—NEGLEY v. COWELL, Iowa, 59 N. W. Rep. 48.

114. TRIAL—Misconduct of Jury.—Where misconduct of two jurors, and of the party with those two, was discovered, and brought to the attention of the court during the trial, and by consent the two jurors were excused, and the trial proceeded with the other ten, such miscondnct is not ground for granting a new trial. —YOUNG v. OTTO, Minn., 59 N. W. Rep. 199.

115. TRUST—Construction.—The indorsement of notes and mortgages to a trustee "for the use of" another does not pass the legal title to the beneficiary though the nature of the trust is not stated.—COLLINS v. PHILLIPS, Iowa, 59 N. W. Rep. 40.

116. TRUSTEE — Bonds — Liability of Sureties.—The sureties of a trustee appointed under a will are liable for funds of the estate, other than rents, which properly come into his hands in the administration of the trust, and are unaccounted for, where their bond was conditioned that he should carry out the terms of the will, though the order appointing him recited that he was appointed under the will to take charge of the rents.—ROBERTS v. CHAMBERS, Iowa, 59 N. W. Rep. 45.

117. TRUSTS — Investments — Third Mortgage.—A trustee, being directed to invest $500 in his hands in realty or United States bonds, and receive and pay over the interest annually, loaned the money to his brother on a third mortgage,—the first $750, being to another; the second $1,000, to himself; both overdue. The money was applied as a credit on the first mortgage: Held, that the third mortgage had priority over the second.—MCEACHERN v. STEWART, N. Car., 19 S. E. Rep. 702.

118. VENDOR AND PURCHASER— Construction of Contract.—A contract for the sale of tannery property, which stipulates that "all bark is to be sold to the purchaser at the cost price thereof," does not embrace bark on trees on other lands of the vendor, to which no reference whatever is made in the contract, but the contract relates only to peeled bark on the premises contracted to be sold. — BAUGH'S EX'RS v. WHITE, Penn., 29 Atl. Rep. 267.

119. WATER COURSE — Diversion.—A natural depression in the soil, down which surface water flowed in a state of nature, forming swamps in places, and carrying water the greater part of the year, and into which a flowing well was afterwards drained, insuring a flow of living water at all seasons of the year, is a watercourse; and an upper riparian owner will be enjoined from diverting the flow of the water at the suit of a lower owner.—RUMMELL v. LAMB, Mich., 59 N. W. Rep. 167.

120. WATERS—Riparian Rights—Accretion.—Assignments in a petition in error not relied on in the briefs will be deemed waived. Where the water of a river recedes slowly and imperceptibly, changing the channel of the stream, and leaving the land dry theretofore covered by water, such land belongs to the riparian proprietor. In case the alteration takes place suddenly, the ownership remains according to former bounds.—GILL v. LYDICK, Neb., 59 N. W. Rep. 104.

121. WILLS—Conditional Fee.—Under a will leaving property to the widow for life in case she remains unmarried, and providing that at her death it shall be distributed between the children equally, and, in case any child be dead at the time of the distribution, leaving children, such children shall take the share of their deceased parent, the children of a testator take a conditional fee, subject to be defeated by their death prior to that of the widow.—COREY v. SPRINGER, Ind., 37 N. E. Rep. 322.

122. WILLS—Construction.—Testator gave his wife a fee in part of his land, and a life estate in the remainder and in his personal estate. Of what remained after her death, he gave $1,500 to two of his sons, and the residue to the others. The personal estate amounted to $3,000 only: Held, that the wife could only use the *corpus* thereof so far as reasonably necessary for her support, and that large gifts thereof by her were infringements on the rights of the remaindermen.—MURRAY v. KLUCK, Wis., 59 N. W. Rep. 137.

123. WILL—Dower—Election.—A devise of all testator's land, consisting of more than a homestead, to the widow for life, remainder to the children in fee, does not put her to an election of her dower, and, at her death, one third of the land descends to her heirs in fee.—BARE v. BARE, Iowa, 59 N. W. Rep. 20.

124. WILLS—Nature of her Estate.—Under a will first giving to the testator's wife his personalty for life, then giving to her his real estate, and providing that, in case she marry, her husband be debarred from interest in the real estate, and, in case she die without being married, the personal and real estate be inherited by those relatives that she may will the same to, or, if no will be in existence, to those by law entitled to it, the wife takes only a life estate in the realty, with a power of disposition in case she does not marry, and otherwise testator's heirs inherit it.—SENFERT v. HENSLER, N. J., 29 Atl. Rep. 202.

125. WILLS—Witnesses—Husband and Wife.—Under Rev. St. ch. 148, § 2, which requires wills to be attested "by two or more creditable witnesses," the husband or wife of a legatee is disqualified by interest from witnessing the bill.—FISHER v. SPENCE, Ill., 37 N. E. Rep. 314.

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.
Published by
Central Law Journal Company,
919 OLIVE ST., ST. LOUIS, MO.

To whom all communication should be addressed.

Subscription price, FIVE DOLLARS per annum, in advance. Single numbers, TWENTY-FIVE CENTS.

Entered at the post-office, St. Louis, Mo., as second-class matter.

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